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24

Aug 3

THE
NEW YORK WEEKLY DIGEST

OF CASES DECIDED

IN THE

N. Y. Court of Appeals, and General Terms of the N. Y. Supreme,
Common Pleas and Superior Courts.

VOL. XXVII.

KF
105.1
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v. 2.7

NEW YORK:
THE NEW YORK WEEKLY DIGEST COMPANY,
95 CHAMBERS STREET.
1888.

Entered according to Act of Congress, in the year 1888, by the
NEW YORK WEEKLY DIGEST COMPANY,
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Rec. Sept. 1887 - May 1888

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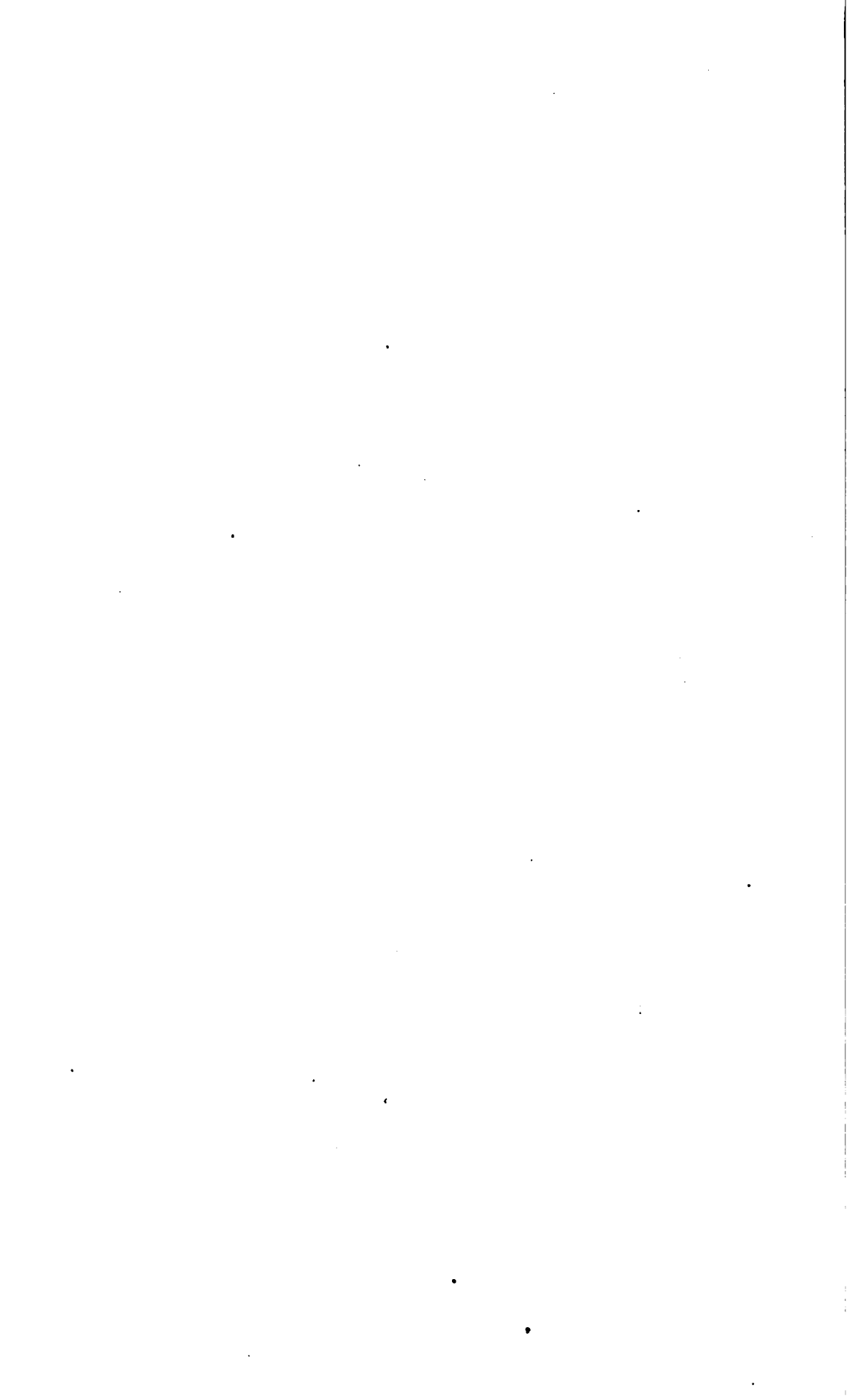
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THE
NEW YORK WEEKLY
DIGEST.

VOLUME XXVII.

COSTS. STAY.

N. Y. COURT OF APPEALS.

Shearman, *respt.*, v. Pope,
applt.

Decided July 1, 1887.

In an action by an infant, the guardian not having given security for costs, an order was made requiring security or a deposit and staying all proceedings except to review the order. Plaintiff procured an order granting leave to prosecute as a poor person. *Held*, That the stay did not deprive the court of jurisdiction to grant the second order, and the latter was an answer to a motion to dismiss for failure to comply with the order requiring security.

This was an action of malicious prosecution. On July 30, 1886, an order was made appointing a guardian *ad litem* for the plaintiff who was an infant. No security for costs having been given by said guardian, in Aug., 1886, defendant procured an order which required plaintiff to deposit \$250, or file security within ten days, and in the meanwhile stayed all proceedings

of plaintiff except to review or vacate the order. Plaintiff having failed to comply with this order defendant moved under § 3277 of the Code to dismiss the action.

This motion was noticed for Oct. 11, 1886. Plaintiff appeared by counsel and had the hearing postponed until Oct. 23. On Oct. 13 plaintiff obtained an order, *ex parte* and in disregard of the stay, granting him leave to prosecute this action as a poor person, plaintiff declaring in his petition that he was a poor person but not disclosing the financial position of the guardian *ad litem*, whom the Code requires to be responsible for the costs of the action. § 469. Upon the hearing of the motion for dismissal the order granting plaintiff leave to prosecute the action as a poor person was interposed and defendant's motion was denied.

John K. Kuhn, for *applt.*

F. J. Moissen, for *respt.*

Held, No error; that the stay of proceedings granted when the first order was made did not deprive the court of jurisdiction to make the second order, and the latter was an answer to the motion to dismiss the complaint.

Order of General Term, affirming order denying motion to dismiss complaint, affirmed.

Opinion *per curiam*. All concur.

PUBLICATION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Aries P. Brooke et al., *respts.*,
v. B. F. Saylor et al.

Walter T. Bradley, *applt.*, v. B. F. Saylor et al.

Decided May 13, 1887.

A substantial compliance with the requirements of the Code is all that is necessary to give validity to a proceeding under § 440.

An order of publication named the defendants to be served and gave their place of residence in Pennsylvania. It directed that if the service was by publication copies should be deposited and addressed "to at" the place aforesaid. *Held*, That there was a substantial compliance with § 440, and that the order was valid.

Appeal from order denying motion to vacate attachment.

Plaintiffs in the first action procured an attachment against defendants and also an order for service of the summons and complaint by publication. Said order stated that all the defendants were non-residents, but resided and did business in or about Royersford, Pa., and that the copartnership of which they were or had

been partners did business at said place; it directed service by publication or by personal service without the State, and in case of service by publication directed the deposit of copies of the summons and complaint in the New York post office, directed "to at Royersford, Pennsylvania." Service was made personally on one of the defendants at Royersford, the copy served having the words "one of said defendants" inserted in the blank left in the original.

Plaintiffs in the second action also procured an attachment and an order of publication, which was served on some of the defendants out of the State and the others appeared in the action. They then moved to set aside the attachment in the first action on the ground that the order of publication was invalid; that no service was made within thirty days, or for an order declaring their lien superior to that in the first action because only one defendant was served and therefore a lien was acquired on his individual interest only, which, the firm being insolvent, was nothing. The motion was denied. The omission in the order was the result of a misunderstanding between the clerk of chambers and plaintiffs' attorney, who supposed the words shown in the copy had been inserted in the original by the justice.

A. W. Otis, for *applt.*

C. S. Clark, for *respts.*

Held, That the order was in form and substance a substantial compliance with § 440 of the Code. Although the name of the defend-

ants was omitted, yet the direction was to serve the summons and complaint by publication and that a deposit be made of those papers and of the order in a securely closed postpaid wrapper and addressed at Royersford, Pa., thus clearly indicating that it was to be addressed to the defendants upon whom and upon whom only it was necessary to serve a copy of the papers, and who in an earlier portion of the order are stated to reside or to do business in or about the place named. A substantial compliance with the requirements of the Code is all that is necessary to give validity to a proceeding under the section mentioned. See 20 Hun, 15; 24 id., 645. The case of *Ritten v. Griffith*, 16 Hun, 454, though it may seem to be in conflict with the view expressed, is not, for the reason that in that case the order simply directed that the summons with a copy of the complaint and order should be served upon the defendant personally without the State, and it was for that reason held to be void. There was an entire omission of compliance with all the provisions of the Code with regard to publication and the service by publication as required by § 440. The option of service by publication or by personal delivery was not preserved by that order and not alluded to in any way, and it was defective in a very important element, therefore. But as we have already seen in the case at bar, constructively, the service by publication was so directed that there can be no mis-

take whatever in the construction or interpretation of the order in regard to it.

Order affirmed, but without costs because of the negligence of the attorney.

Opinion per curiam.

N. Y. CITY. JURISDICTION.

N. Y. COURT OF APPEALS.

Pollock, *respt.*, v. Morris, *applt.*

Decided May 13, 1887.

The provision of § 993, Chap. 410, Laws of 1882, which enacts that the city may pay the award into the Supreme Court, was for the benefit of the city which may adopt it as a defense to an action brought in another court but is not obliged to do so. A party interpleaded by it cannot rely upon such provision to attack the jurisdiction of the court. So held, where the action was brought in the Superior Court.

This action was brought in the Superior Court of the city of New York, against the city, to recover an award made for land taken for a street, which was also claimed by another party. Said party was substituted as defendant in place of the city by an order which also provided that the city should be discharged upon its paying the amount of the award into the hands of the chamberlain to the credit of the action. The payment required was made by the city. The newly substituted defendant claimed that the Superior Court was without jurisdiction under § 993 of Chap. 410, Laws of 1882, the New York consolidation act, which enacts that when no ownership is named in the report of the commissioners in proceedings

to open a street, or the owners named cannot be found, "it shall be lawful for the city to pay the award into the said Supreme Court."

W. Stebbins Smith, for applt.

James R. Marvin, for respt.

Held, That the present defendant could not attack the jurisdiction of the court; that the provision of the act of 1882 upon which he relies was for the benefit of the city and it might adopt or plead it as a defense, but the city is not compelled to resort to such defense; that this action could be maintained. 57 N. Y., 344; 87 id., 359.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Finch, J.* All concur.

CONTRACT. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Joseph Sutherland et al., applts., v. Thomas Morris, respt.,

Decided July, 1887.

Where a building contract contains a provision that no extra work will be done unless agreed to by the superintendent, the price reduced to writing and signed, it is not error, in an action thereon, to exclude proof of extra work and materials where there does not appear to have been a compliance with the condition aforesaid.

Appeal from judgment.

Action upon a written contract by which plaintiffs agreed to furnish materials and labor for the masonry work of a house. In it they agreed to perform the work agreeably to certain drawings and specifications, which contained a

provision that "the contractor will take notice that there will be no extra work done unless agreed upon by the superintendent, the price put in writing and signed." On the trial plaintiffs offered proof of labor and materials furnished beyond the requirements of the contract, without showing a compliance with the aforesaid condition. The offer was rejected on the ground of a failure to comply with the condition.

R. E. & A. J. Prime & Burns, for applts.

Joseph F. Daly, for respt.

Held, No error. The condition was introduced to prevent the very thing which plaintiffs now attempt. The contractors had before them a specific delineation of the work they were to perform, and they were never requested to do anything more than to complete what they undertook in conformity with their contract. The recovery seems to fairly include all the legal liabilities of defendant to plaintiffs.

Judgment affirmed, with costs.

Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

RAILROAD. EMPLOYEE. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Joseph Smith, respt., v. The N. Y. C. & H. R. RR. Co., applt.

Decided June, 1887.

Under all the circumstances of the case, *Held*, That the several instructions to the jury were without error, and the denial of motion for new trial was correct.

Appeal from order at Circuit denying defendant's motion for new trial on the minutes.

Action for damages for personal injuries to plaintiff alleged to have resulted from defendant's negligence.

Plaintiff was in defendant's employ as a brakeman on a coal train going eastwardly, which collided with an empty freight car standing on the track, about a mile east of Newark, at about 5:30 o'clock in the evening, in Feb., 1884. The empty car was a grain line box car, which had that day been put upon a siding of defendant's road at Newark, and there left standing. Evidence tended to show that it was afterward blown by the wind to the place of collision. At the foot of the siding was a switch leading to the main line, and opening automatically toward the west. By the siding was a warehouse occupied by P. & Co., grain shippers. The car in question was one of three that had been brought from the west that day. Later in the day the two easternmost cars had been pushed by the warehouse men a little farther east to the grain spouts to be loaded, leaving the third car standing alone. Plaintiff's theory was that the brake on the car was defective, and in consequence thereof the car was pushed or driven onto the main line where the collision occurred. Defendant contended that the defect, if any existed, was not the cause of the car moving onto the main track, and that such movement was the result of the neglect of the men of P. & Co.,

or of Donk, defendant's station and freight agent, or some other of defendant's employees at the station to take proper measures to prevent the car from moving. Evidence tended to show that a month or more before the collision defendant's superintendent issued a printed order addressed to its freight agents, depot and yard masters, and distributed along the road, which was as follows: "You are hereby cautioned against leaving cars on sidings, in position for the wind to move them, so as foul the main track. Brakes must always be set firmly and a chock used." Donk testified that he was of the impression that he received a copy of the order; that it was his duty to look after the cars at the station; that he could not always do it himself because he had other duties to perform; that he ordered the three cars upon the siding for the use of the warehouse men upon their application for cars; that he saw the cars about five o'clock, but could not say whether they were separated, and he was not aware they had been separated. The judge left it to the jury to say whether it was the wind that moved the car from the siding to the main track, and if it was, whether that effect came about by reason of the absence of a brake which was fit and suitable for the purpose of holding the car, and if those facts were established, whether defendant had exercised all reasonable care to provide against the imperfection from which the accident resulted. And he instructed the jury that defend-

ant is not responsible for neglect on the part of Donk or any other employee of the company, or of the men engaged in the warehouse, but if the company neglected to furnish a brake for the car, fit and suitable, and such neglect contributed to the injury, the company is liable, although negligence on the part of Donk or some other person may have contributed to the result.

Edward Harris, for applt.

W. S. Oliver, for respt.

Held, That the foregoing instructions were correct.

The court refused defendant's request to charge that it was the duty of Donk, the station agent, to see to it that the brake was set, so far as it could be useful to set the same to control the car, and to put a chock under the wheel; and that if he had performed his duty in this respect, although the brake was defective and alone would not have held the car against the wind that arose on the day in question, the accident would not have happened, the defendant is not responsible.

Held, No error. The question whether Donk's duty was as assumed by the request was for the jury. Even if Donk received the order, the question whether his omission to do what it required, on the occasion in question, was negligence on his part, was for the jury. It was also for the jury to say whether the car would have moved if it had not been separated from the others, and if not, whether Donk knew, or ought to have known, that it was separated.

The last clause of the request is not clear, as it should be. 11 N. Y., 61, 79. The request assumed that if Donk, as well as defendant, was negligent, the latter was relieved from responsibility. Not so. 53 N. Y., 549; 73 id., 38; 81 id., 206; 91 id., 332; 95 id., 546; 100 id., 516.

Order affirmed.

Opinion by *Smith, P.J.*; *Haight* and *Bradley, JJ.*, concur.

MARRIED WOMEN. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Mary J. Burley, respt., v. *Orren Barnhard, ex'r, applt.*

Decided June, 1887.

Plaintiff and her husband occupied the testator's farm, working the same on shares, he living with them, and receiving her care and attention during his sickness. Testator repeatedly promised plaintiff, and also her husband, that he would pay her for her work and trouble if she would not leave the house, as she had several times threatened and prepared to do. Her husband had also told her that she might have whatever the testator should pay her. *Held*, That the facts and circumstances were sufficient to indicate an intention on the part of the wife to separate her earnings from his, and to avail herself of the right conferred by Chap. 90, Laws of 1860, to perform services on her sole and separate account; that it was a question of fact whether it was understood by the parties that the compensation was to be paid for her separate use and property, and the referee was warranted in so finding. The right or title of a married woman in a claim for services, rendered on her sole and separate account, is not derived from, through, or under her husband, and therefore he is a competent witness to testify in her favor in an action against an executor, etc.

A physician who had formerly attended a patient, but whose services had ceased, may give testimony as to the condition of the patient on subsequent occasions, when he was no longer attending him in a professional capacity, as indicated by outward, visible manifestations, but he cannot disclose any information acquired by him whilst attending in a professional capacity.

Appeal from judgment entered upon order of Special Term, confirming report of referee upon a disputed claim referred under the statute.

Plaintiff is the wife of Edwin Burley, a son of defendant's testator. Claim for services in nursing and caring for the testator during his sickness for seventeen months. Plaintiff and her husband occupied testator's farm, working the the same upon shares, he living with them. It appeared that two years prior to said sickness, her husband told her that she might have whatever his father should pay her for taking care of him. Testator was irritable and they did not get along together, and she threatened to leave him, and on one occasion he said, "Go on and do the work as you have done and I will pay you." On another occasion deceased wanted Edwin to induce plaintiff to stay: "He said if she would stay he would pay her for it; he said she was determined to leave, she was packing up her trunk." Edwin told this to plaintiff, and then went back and reported to his father that she still refused to stay. Thereupon testator went to the house himself and induced her to stay, and she went about her work as usual. These facts were testified to by

Edwin Burley. A farm hand testified that on one occasion he overheard a conversation between plaintiff and testator at noon when he came in to dinner; that he said he would pay her for the trouble she had, and she said she would stay; he was crying and begging her to stay and he would pay her for her trouble.

The referee found that there was an agreement to compensate plaintiff for her trouble, and that she was entitled to maintain suit in her own right.

C. H. Wiltsie, for applt.

Wilkin & Pierce, for respnt.

Held, That the facts and circumstances adduced in evidence warranted the findings of the referee.

This provision, § 2, Chap. 90, Laws of 1860, is not to be understood as wholly abrogating the common law rule entitling the husband to the services and earnings of the wife; she may still allow him to claim and appropriate the fruits of her labor, and in the absence of an election on her part to labor on her account, or of circumstances showing an intention to avail herself of the privilege conferred by the statute, the husband's common law right remains unaffected. It, consequently, became a question of fact to be determined by the referee whether, when the services were being performed by her in taking care of testator, it was understood at the time by the parties to the agreement that the compensation was to be paid to her for her separate use and property, and this fact

had to be determined from the facts and circumstances of the case. 74 N. Y., 359.

Although plaintiff and her husband were living together upon the farm, she doing the ordinary household duties of a wife, there were some circumstances indicating an intention on the part of the wife to separate her earnings from his, which, taken in connection with the promise of the testator to pay her for her labor, incline us to the opinion that the referee was justified in finding that she was entitled to maintain the action.

Held further, That the claim of plaintiff was not derived through her husband; it was for services which she performed on her sole and separate account, and consequently he was not prohibited from testifying under § 829 of the Code.

A physician who had formerly attended testator was questioned as to whether he observed him during the time subsequently, when he was not attending him as a physician. He answered that he did and observed his condition. This, and other questions of a similar nature, were taken under objection.

Held, That as the answers referred only to the outward, visible facts that were observed by him on those occasions when he was not attending as a physician, and which were open and visible to the sight of any person, the testimony was admissible.

In none of them do the answers disclose any information which was acquired by him whilst attending in a professional capacity,

and the evidence, consequently, was not brought within § 834. 77 N. Y., 564.

Judgment affirmed.

Opinion by *Haight, J.*; *Smith, P.J.*, and *Bradley, J.*, concur.

VILLAGES. COSTS.

N. Y. COURT OF APPEALS.

Gage, *respt.*, v. The Village of Hornellsville, *applt.*

Decided July 1, 1887.

Actions to recover damages for injuries caused by negligence of the servants of municipal corporations are not within the purview of § 8245.

A claim against a village cannot under said section be presented to the board of trustees; the chief fiscal officer is the treasurer.

Affirming S. C., 24 W. Dig., 806.

This action was brought to recover damages for injuries received by plaintiff through a defect in one of defendant's sidewalks. Plaintiff recovered a judgment. Plaintiff served upon defendant's attorney a bill of costs with notice of taxation. Upon the taxation, defendant objected to the allowance of the costs upon the ground that before the commencement of the action plaintiff had not presented to defendant's treasurer, its chief fiscal officer, the claim upon which the action was founded, as required by § 3245, Code of Civ. Pro.

I. W. Near, for *applt.*

George N. Orcutt, for *respt.*

Held, Untenable; that actions for the recovery of damages for injuries sustained by reason of the negligence of the servants of a municipal corporation are not

within the purview of § 2 of Chap. 262, Laws of 1859, the provisions of which section were substantially embodied in § 3245 of the Code. 102 N. Y., 54.

Baine v. The City of Rochester, 85 N. Y., 523, distinguished.

Also held, That a claim against a defendant could not under said section of the Code be presented to its board of trustees. The chief fiscal officer of such a corporation is the officer who receives, keeps and disburses the moneys of the corporation, and such an officer is the treasurer.

Order of General Term, affirming order of Special Term, denying motion for a new taxation of costs, affirmed.

Opinion *per curiam*. All concur.

REFERENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Mari A. Cuming, applt., v. *William M. Whiting, respt.*

Decided June 18, 1887.

In an action for goods sold and money loaned, etc., the answer, besides a general denial, set up a copartnership between the parties and alleged that the indebtedness, if any, was incurred by said partnership and not otherwise. *Held*, That this being the true issue, a reference could not be had.

Appeal from order of reference.

The complaint sets out two causes of action—one upon an account stated, and the other for goods sold and delivered and money loaned, paid out and expended for defendant by plaintiff.

The bill of particulars served in the action relating to the second cause of action consisted of twenty-two items of goods sold and cash advanced.

Defendant by his answer denied each and every allegation of the complaint relating to the first cause of action, and also denied each and every allegation of the complaint relating to the second cause of action, and then alleges that plaintiff and defendant were copartners in business and that the indebtedness alleged in said second cause of action was incurred, if at all, by said partnership and not otherwise.

A. B. Cruikshank, for applt.

Frederick Seymour, for respt.

Held, That the order of reference was erroneous.

It is clear that the first cause of action being upon an account stated was not referable. There could be no issue as to items, the only question being as to whether the account had become stated between the parties and whether there had been a promise to pay.

Upon a cursory examination of the pleadings as to the second cause of action it might appear that controversy would arise as to all the items of goods sold and money loaned, because of a general denial contained in the answer, but the subsequent allegations therein contained as to the copartnership and that the indebtedness was incurred, if at all, by said partnership, shows what the true issue is, and that it is not as to the sale and delivery of the goods, but as to whom they were sold.

This being the true issue, there does not seem to be any ground for a reference.

Order reversed, with \$10 costs, etc., to appellant to abide final event.

Opinion by *Van Brunt, P.J.*; *Daniels* and *Bartlett, JJ.*, concur.

COLLATERAL INHERITANCE TAX.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

In re taxation of estate of Hannah Enston, deceased.

Decided July, 1887.

The collateral inheritance tax law applies to property within this State of a non-resident decedent.

Appeal from order of surrogate.

Proceedings to assess and fix the cash value of the estate in order to collect the tax thereon under Chap. 483, Laws of 1885, known as the collateral inheritance tax law.

Deceased was a resident of Pennsylvania and died in South Carolina Oct. 26, 1886, leaving real and personal property in Kings County, in this State. Her will was probated in said county, and this proceeding commenced.

The executors claim that, decedent not being a resident of this State at the time of her death, the legacies under the will are not subject to the law of 1885, notwithstanding the property so bequeathed was at the time of her death invested and located within this State.

, for applts.

, for respt.

Held, Untenable. Section 11 of the act provided that "Whenever any foreign executor, etc., shall assign or transfer any stock standing in the name of the deceased or in trust for decedent, etc." By § 5 it is further provided that the "Surrogate's Court in the county in which the real property is situated of a decedent who may not be a resident of the State * * * shall have jurisdiction, etc." Thus in the former section announcing that capital invested in this State comes under the statute and is subject to the tax, and in the latter section giving the surrogate jurisdiction to determine the tax to be imposed upon real estate.

A fair interpretation of the statute seems to negative any exemption from taxation of the property in question. The statute seems to provide for two cases. 1st, where decedent is a resident of the State, and 2d, where the property of decedent is in the State at the time of his death. The statute relates to the taxation of property, and the words "or which property shall be within this State," must be regarded as the alternative of the words "while being a resident of this State." This is the only construction that will give any force or effect to the words "or which property shall be within this State," and necessarily includes property within this State at the time of the death of a non-resident. The statute expressly states that "All property which shall pass by will or intestate laws" shall be subjected to the tax.

Those words necessarily included property of non-resident as well as resident decedents.

The grammar of § 1 of the act may be the subject of just criticism, but in view of the well-settled policy of the State in regard to taxation and the inconsistency of adopting any other construction than that adhered to by the surrogate, we think the decree must be affirmed.

It seems to be conceded that property passing by grant to take effect at grantor's death is subject to tax without reference to the residence of the grantor. It is difficult to see why property passing by will should be free from tax while property passing by grant to take effect at grantor's death would be liable to taxation. Such an inconsistency cannot be imparted to a legislative act.

Decree affirmed, with costs.

Opinion by *Pratt, J.*; *Barnard, P.J.*, and *Dykman, J.*, concur.

PRACTICE. APPEAL.

N. Y. COURT OF APPEALS.

Symson, applt., v. Selheimer, respt.

Decided April 26, 1887.

An application for leave to amend the statement of a confession of judgment is addressed to the discretion of the Supreme Court, and upon appeal from the order thereon the Court of Appeals cannot add other conditions to those imposed by the court below.

A condition postponing the lien of the judgment to those existing at a certain date does not postpone as to a judgment docketed in form, but which is as matter of law void.

Plaintiff moved at Special Term for leave to amend the statement of a confession of judgment in the above entitled action. The motion was granted without condition. On appeal the General Term affirmed that part of the order of the Special Term granting leave to amend, but coupled with it a provision absolutely postponing the lien of plaintiff's judgment. Upon appeal to this court the order of the General Term was modified by providing that plaintiff's motion to amend should be granted upon his consenting to postpone the lien of his judgment to those existing Oct. 5, 1885, as to all real estate embraced in the assignment of the judgment debtor of Dec. 15, 1884. A motion was made to amend the remittitur.

Nathaniel Foote, for motion.

John H. White, opposed.

Held, That the motion should be denied; that the present motion to amend the remittitur by putting in some other condition than that imposed by the Supreme Court is an appeal from the discretion exercised by that court and a request for this court to exercise its discretion, which it has not power to do; that the order of the General Term as modified by this court, in case plaintiff accepts the conditions, cannot be construed to postpone the plaintiff's judgment to the lien of a judgment docketed in form, but which is, as matter of law, void.

Also held, That the motion made by plaintiff at Special Term, to amend the statement of a confession of judgment, was addressed

to the discretion of the Supreme Court. The amendment was not one he had a legal right to demand, but one which the court might in its discretion refuse or grant upon such terms as to it might seem just. 27 N. Y., 300.

Motion denied.

Opinion *per curiam*. All concur.

RAILROADS. TAXES. CERTIORARI.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The People *ex rel.* The West Shore RR. Co., *applt.*, v. Alfred D. Putnam et al., assessors, *respts.*

Decided June, 1887.

The neglect or omission of a railroad company to make and deliver to the assessors, on or before July 1st of each year, a statement showing the real estate owned by it in the town, and its cost, as required by the provisions of the Revised Statutes, does not deprive it of the right to a hearing on grievance day and a correction of the roll, if just and proper; and if said statement is then presented, that is sufficient to entitle it to a hearing.

Under the statute for the review of assessments by *certiorari*, the writ is properly directed to the assessors, even though the roll has been duly filed in the office of the town clerk before the writ was allowed and served.

Appeal from order quashing a writ of *certiorari*.

The writ was issued pursuant to Chap. 269, Laws of 1880, to review an assessment roll. The assessors returned, first, that the roll had been duly filed in the office of the town clerk before the writ was allowed and served; secondly, that no statement had

been served upon them by the relator showing the real estate owned by it in the town, and its cost, as required by statute. 1 R. S., 414, §2. Thereupon the writ was quashed.

J. M. Davy, for *applt.*

C. M. Elliott, for *respts.*

Held, That the failure of relator to make and deliver said statement to the assessors did not deprive it of the right to a hearing on grievance day and a correction of the roll by the assessors if just and proper; and if the relator was entitled to this correction on grievance day, it has the right to have the same enforced through the writ issued for a review herein.

We apprehend that the relator is entitled to such a hearing on grievance day as any natural person, and that it could not be deprived thereof by its failure to comply with the statute requiring the statement to be filed before July 1st of the year.

The assessors could have relieved the relator if injustice had been done, even though they did not have the aid of the statement required in making the original assessment.

People *ex rel.* Mut. Union Tel. Co. v. Com'rs. of Taxes, 31 Hun, 568; 99 N. Y., 254, is distinguishable. There the relator did not appear on grievance day; but here it appeared, through its attorney, and requested that the valuation of its property be reduced, and it then delivered to the assessors a sworn statement of its real estate, etc.

It is contended that the writ was

rightly quashed for the reason that the roll had been filed with the town clerk, who was a necessary party to the writ.

Held, Untenable. We are aware that the common law writ should issue to the officers having the custody and control of the records sought to be reviewed and which are required to be returned by the writ; but the statute under which this writ was issued is quite different. The original roll is not required to be returned. No stay of proceedings takes place. The officer to whom the writ is issued may return certified a sworn copy of the roll or papers required, and may concisely set forth such other facts as may be pertinent and material to show the value of the property assessed in the roll, and the grounds for the valuation. No officers could well do this but the officers upon whom devolve the duty of making the assessment. By the statute, the roll must be delivered to the clerk for public inspection, and the writ must issue within the fifteen days that the roll is required to remain in his hands, after public notice given. If, therefore, respondents' position be correct, the clerk in every instance would be the officer to whom the writ would have to issue. Such, however, does not appear to be the meaning or the intent of the statute. 24 Hun, 66.

Under the statute the return is not conclusive, as the court is authorized to take evidence, or appoint a referee to take it, etc. Relator, therefore, was not bound by the return; it might have been

able to furnish evidence that the statement required by statute had been made and served. The court should have given an opportunity to do so, if requested. A motion to quash is somewhat in the nature of a demurrer, and is ordinarily based upon the papers upon which the writ was issued. It is not the usual practice to quash upon a hearing based upon the return. Upon such hearing the court should make a final order in the proceedings, either nullifying, confirming or modifying the determination under review.

Order reversed.

Opinion by *Haight, J.*; *Smith, P.J.*, and *Bradley, J.*, concur.

REVIVOR.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Henry R. Pierson, *recr.*, *applt.*,
v. Andrew W. Morgan, *respt.*

Decided May 13, 1887.

Under § 757 of the Code, as it now stands, an action may be revived on motion of the representative of a sole deceased defendant where the cause of action survives.

Appeal from order directing plaintiff to cause the action to be revived, or in default thereof that defendant's administratrix be substituted and the action dismissed with costs and allowance.

This action was brought in 1883 by plaintiff as receiver of the Widows' & Orphans' Benefit Life Insurance Co., upon an alleged guaranty executed by defendant and others for the benefit of certain policy holders in said com-

pany. Other actions were brought upon said guaranty. Defendant died in March, 1886. Mrs. C., having been appointed his administratrix, thereupon made the motion resulting in the order appealed from. Plaintiff, among other things, claims that the court has no power to revive an action on the death of a sole defendant upon the application of his administratrix.

Raphael J. Moses, Jr., for applt.
P. H. Vernon, for respt.

Held, Untenable. The case of *Livermore v. Bainbridge*, 49 N. Y., 125, is an express authority that under § 121 of the Code of Procedure the personal representatives of a deceased defendant could not have an action revived unless the deceased defendant had acquired some right by some interlocutory judgment therein or had become an actor in the proceeding by the presentation of a counterclaim, and this conclusion was based upon the wording of this section which permitted the revivor within one year to be upon motion, or afterward upon supplemental complaint. It was deemed by the court that the reference to a revivor by supplemental complaint assumed that the plaintiff or his representative is the moving party referred to.

In the Code Civ. Pro., however, these words are omitted from § 757 as such section now stands, and they were probably omitted because of the construction which had been placed upon them in connection with this matter of revivor, as there would seem to be

no good reason why the representative of a deceased defendant should not have the privilege of having an action revived so that it might proceed to judgment, instead of that right being vested wholly in a plaintiff.

We think that in view of the present language of the Code that the case cited is an authority in favor of the order appealed from, and such a construction seems to be in evident accordance with the language of the section. The provision as to allowance does not seem to have been an improper exercise of discretion. Plaintiff may continue the litigation if he so desires, and if not he should be required to pay the usual terms as a condition of being permitted to retire.

Order affirmed, with \$10 costs and disbursements.

Opinion *per curiam*.

SURETYSHIP. SECURITY.

N. Y. COURT OF APPEALS.

Boyle, respt., v. *Boyle et al.*
McCahill, applt.

Decided June 14, 1887.

To secure the sureties on his bond an administrator assigned to them his interest in the estate, and afterward mortgaged said interest to another person. He failed to file an inventory, drew out the funds and could not be found. One of the sureties then commenced proceedings to be discharged and to compel the filing of the inventory. The administrator disobeyed the order of the court and was attached, but afterward accounted, and was discharged. *Held*, That the expenditure incurred by the surety in said proceedings was not created by the suretyship nor within the terms of the assignment.

Modifying S. C., 23 W. Dig., 346.

This was an appeal from an order of General Term, affirming an order confirming the report of a referee as to surplus moneys arising in an action of partition of the lands of M. M. It appeared that one W. M. was appointed her administrator, and on June 1, 1883, executed a bond with W. and E. as sureties. To secure his sureties W. M. executed to them an assignment of his interest as heir-at-law in the proceeds of the action in partition. On Aug. 17, 1883, W. M. made an assignment by way of mortgage of the same interest to one McC. The assignment to the sureties recited that it was to secure them against "such loss, expense, sum or sums of money" as they "may incur or be put to from any loss, error, mishap or cause whatsoever in relation or regard to their suretyship on the said bond." The administrator failed to file an inventory and on W. discovering that he had drawn the funds of the estate from the bank, and had assumed different names and could not be found, he instituted proceedings to be released from his bond and to compel W. M. to file an inventory. These proceedings resulted in a decree directing W. M. to account and pay over. He disobeyed the decree, was attached for contempt and arrested. Thereafter a judicial settlement of his accounts was made and W. M. was discharged, it appearing that he had paid out in funeral expenses more than all the personalty. W. in prosecuting these proceedings was put to an expense of \$500,

for which sum the referee reported he was entitled to a lien prior to that of McC. on the share of W. M. in the proceeds. W. recovered a judgment for that amount against W. M.

De Witt C. Brown, for applt.

James C. De La Mare and *John W. Goff*, for resp't.

Held, Error; that W.'s loss did not come from his liability on the bond but first from his effort to be discharged as surety, for which W. M. was not accountable, and second from his interference to make W. M. account, and the expenses incurred were not contemplated by the indemnity or fairly within its terms. It did not cover an expenditure not created by the suretyship.

Order of General Term modified so as to give McC. preference over W., and as modified affirmed.

Opinion *per curiam*. All concur.

ASSIGNMENT FOR CREDITORS. CONTRACT.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Henry Patton, assignee, *applt.*,
v. The Royal Baking Powder Co.,
resp't.

Decided July, 1887.

Where an assignee for creditors adopts a contract of the assignor and undertakes its performance, but thereafter fails and refuses to carry it out, a counterclaim for breach of the contract may be allowed in an action by the assignee for goods furnished under the contract.

Appeal from judgment.

Action for the sale and delivery of packing boxes by plaintiff to

defendant. The answer admitted the allegations of the complaint, and alleged that the goods were delivered under a written contract between defendant and one H., by which he agreed to furnish all the boxes defendant might require for one year from Jan. 1, 1885, at certain prices; with a proviso that in case of a failure to keep defendant supplied at any time he, defendant, could supply its wants in open market without notice and H. was to pay any difference in the cost; that H. assigned the contract to plaintiff, who accepted the same and entered on its completion and delivered the boxes in suit under said contract; that about Oct. 1, 1886, plaintiff ceased to deliver boxes under the contract, and defendant was compelled to purchase in open market at an increased cost of \$2,124.18, which he set up as a counterclaim.

On the the trial defendant produced testimony to show the adoption of the contract by plaintiff, who was the general assignee of H. for the benefit of his creditors, and the commencement of its execution with the assent of defendant. The court charged that there was no legal obligation on the part of the assignee to fulfill the contract, "but he did go on making these deliveries, and the fact for you to determine is whether he simply made those deliveries intending to keep up and maintain the status between these parties until the creditors could determine whether they would permit the assignee to adopt the contract and fulfill it; whether that

was his intention and known to be by defendant (because it knew that H. had made this assignment) and acquiesced in by them; or did he by his actions adopt the contract, make himself a party to it and take the benefits that he could derive from the contract and assume its obligations. Unless he did the latter he is not liable in this action." "If you find those two facts, that there was an adoption by the assignee of the contract, and having adopted it there was a refusal on his part to perform it, then you have the elements of a claim in favor of defendant against him, and it will be for you to go on and determine what the amount of that claim is." The jury found on this point in favor of defendant as to the counterclaim.

Plaintiff claims that the counterclaim could not be sustained and permitted as an offset against him as assignee.

Jackson & Burr, for applt.

Platt & Downs, for resp't.

Held, Untenable. If we assume, as we must, that the jury found the facts required by the charge to be found before a verdict could be made in defendant's favor, then a plain case is presented for the allowance of the counterclaim in reduction of the claim of plaintiff. The counterclaim arose out of the same contract and transaction set forth in the complaint as the foundation of plaintiff's claim, and its allowance is manifestly just and right. By the adoption of the contract plaintiff became entitled to all the benefits its performance and fulfill-

ment might afford and he also became responsible for the liabilities its violation or breach might involve. He assumed its burdens and its obligations as well as its advantages and benefits. This examination seems to demonstrate the legal right of defendant to the allowance of its counterclaim as an offset to the demand of plaintiff as far as it extends, and that is the main question presented by this appeal.

There is no force in the objection raised by plaintiff to the failure of defendant to go into the open market to procure the boxes which plaintiff failed to furnish. The best answer to be made to the objection is that there was no open market for boxes into which defendant could go to purchase. Packing boxes must be manufactured to order, and they are not kept in stock on sale like ordinary articles of merchandise or different kinds of grain.

Judgment affirmed, with costs.

Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

NEGLIGENCE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Louisa Ster, applt., v. Catharine Tully, resp't.

Decided June, 1887.

In an action for damages sustained by reason of a defect in a sidewalk, a witness was asked if he ever stumbled and fell at that place. *Held*, That as the questions put to the witness did not refer to the time when the witness fell, or to the condition of the walk at that time, or that it

was in the same condition as when plaintiff fell, they were properly excluded.

An offer to prove that other persons passing back and forth over this walk fell on the same spot where plaintiff fell, "while the walk was in the condition described" was held insufficient, because the "condition described" by the previous witness was not confined to the actual condition the walk was in at the time of the accident; and an offer the exclusion of which is made the basis of error should be strictly construed.

The temporary removal of a sidewalk, rendered necessary in excavating a cellar and erecting a building, is not necessarily and under all circumstances a wrongful act, and amount to the creation of a public nuisance; but the owner, or person removing it, is bound to properly guard and furnish reasonably safe passage for the public, and if such provision is made he is not chargeable with a wrongful act or the creation of a nuisance; and in such case the question of negligence, *i. e.*, whether the walk was left in a reasonably safe and proper condition, is involved in the case.

Appeal from judgment entered upon verdict and from order denying new trial.

Action for injuries received by falling upon a sidewalk in front of defendant's premises, because of a defect therein caused by taking up a portion of the walk, whereby plaintiff, after passing over the part which had been taken up, stubbed her foot against the plank where the walk again commenced, and fell, etc. The removal of the walk was rendered necessary by reason of excavating a cellar and constructing a building.

A witness, Staple, was asked: "Do you know of any other person who stumbled or fell at this walk?" Question excluded. Plaintiff then offered to show "That other persons passing back and

forth over this walk fell on the same spot where the accident occurred to plaintiff, while the walk was in the condition described."

Excluded. Witness Frank was asked: "Did you ever stumble and fall at that place?" Answer, "Yes, sir." Stricken out.

W. E. Werner, for applt.

M. W. Cooke, for resp't.

Held, That as the questions put to the witnesses did not refer to the time when the witnesses fell, or to the condition of the walk at that time, or that it was in the same condition as when plaintiff fell, they were properly excluded.

Held also, That the offer was insufficient, the "condition described" not being confined to the condition the walk was in at the time of the accident.

The rule laid down in *Quinlan v. Utica*, 11 Hun, 217; 74 N. Y., 603; and *District of Columbia v. Armes*, 107 U. S., 517, is too firmly established to be questioned here. But the rule should not be enlarged so as to raise numerous collateral issues; for if the walk was not in the same condition, or if the persons who had fallen were intoxicated, aged or infirm, the evidence might mislead and do harm instead of tending to show the actual and dangerous condition of the walk. The offer is to show that other persons passing back and forth over this walk had fallen, etc., while the walk was in the *condition described*. No such question was put to any witness; and an offer the exclusion of which is made the basis of error should be strictly construed. The char-

acter or condition of the persons, the time when, and the conditions under which they had fallen, does not appear in the offer. The offer states the "condition described," but on referring to the evidence of the witness Staple just preceding the offer, and who was then upon the stand, we find three conditions of the walk described. In the first place, a portion of the walk was taken up and it was leveled off with dirt taken from the cellar; after that another portion of the walk was taken up and the walk left at the end was above the ground some distance, which the witness appears to have indicated, but which does not appear in the case, and that afterward an entire walk was constructed of plank. It will thus be observed, that the "condition described" appearing in the offer does not necessarily confine the evidence offered to the condition that the plank was in at the time plaintiff fell; and we are consequently to regard the offer as falling short of the rule laid down in *Quinlan v. Utica*.

The court was requested to charge that the taking up of the walk was a wrongful act, and if done by authority or permission of defendant, etc., she was liable for any injury resulting by reason of it, irrespective of the question of negligence. Refused. The question tried and submitted to the jury was whether or not the walk was in a reasonably safe and proper condition. The testimony was conflicting.

Held, That the request was properly refused. The removal of

a sidewalk is not wrongful under all circumstances. Defendant caused a new walk to be constructed in place of the old one, and the old one had to be removed to give place to the new. In the construction of buildings it often becomes necessary to temporarily remove a sidewalk, in order to excavate cellars and carry in the material used in the construction of the buildings. Such temporary removal does not constitute a nuisance; but the person doing it is bound to properly guard and furnish reasonably safe passage for the public; and if such provision is made he is not chargeable with a wrongful act or of creating a nuisance; and unless the act was wrongful or a nuisance created, the question of negligence was involved in the case.

Judgment and order affirmed.

Opinion by *Haight, J.; Smith, P.J., and Bradley, J.*, concur.

PLEADING. · SHAM ANSWER.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Ralph Schoonmaker, *respt.*, v. The Mayor, etc., of N. Y., *applt.*

Frederick W. Loew, *respt.*, v. The Mayor, etc., of N. Y., *applt.*

Thomas J. Powers, *respt.*, v. The Mayor, etc., of N. Y., *applt.*

Decided March 31, 1887.

To warrant the striking out of an answer or a part thereof, it must be so plainly so that there can be no controversy or argument on the subject. *So held*, Where the defense of the statute of limitations was stricken out as sham.

Appeal from orders striking

from the answers the defenses of the statute of limitations.

Actions to recover back moneys paid in satisfaction of assessments. The answers, among other defenses, set up the statute of limitations. In the first case payment was made Nov. 7, 1877; claim presented Sept. 28, 1883, and suit commenced Nov. 29, 1886. In the second, payment made Oct. 19, 1876; claim presented March 27, 1884, and suit commenced Nov. 29, 1886. In the third payment made April 19, 1875; claim presented Sept. 30, 1885, and suit commenced Dec. 8, 1886.

G. H. Sterling, for *applt.*

Shipman & Acker, for *respts.*

VAN BRUNT, P.J.—The record in this case shows a rather ingenious attempt to get this court to adjudicate upon legal propositions which could only be brought up properly by an appeal from the judgments rendered in the actions. It is the first time, so far as we have been able to ascertain, that the defence of the statute of limitations has been stricken out as sham, frivolous, irrelevant and immaterial, particularly where the respondent for the purpose of showing that it is sham and frivolous has devoted pages of his points in discussing a difficult question of law. If an answer or any portion thereof is sham and frivolous it must be so plainly so that there can be no controversy or argument on the subject. It being demonstrated by the arguments which have been submitted upon this appeal that they must be supported, if they can be at all,

by elaborate discussion and citation of authorities, they seem to be erroneous and should be reversed, with costs and disbursements in one case.

Brady and Daniels, JJ., concur.

BANKS. BONA FIDE HOLDER.

N. Y. COURT OF APPEALS.

The Flour City Nat. Bk. of Rochester, *applt.*, v. The Traders' Nat. Bk. of Rochester, *respt.*

Decided May 10, 1887.

Plaintiff certified a draft presented by the City Bank, which was retained by said bank in pursuance of a custom in the city by which the bank presenting such paper should hold it as an item of credit in the exchange account with the certifying bank. On that day the balance of account was in plaintiff's favor, which was to be settled the following day. The City Bank transferred the draft to defendant as a payment on its balance due that day. *Held*, That defendant was not a *bona fide* holder.

This was an action brought to recover a balance alleged to be due from defendant to plaintiff on its exchange account for Dec. 19, 1882. It appeared that the City Bank of R. held a draft payable at plaintiff's bank. It was presented at maturity and the draft was marked certified and retained by the City Bank according to a custom in R. under which commercial paper held by one bank, payable at another, on being presented at maturity at the bank at which it was made payable, instead of being paid on presentation was marked "certified" and then returned to the bank who presented it, to be held as an item of credit on the exchange account

between it and the certifying bank. That account for each day was settled on the day following and the balance paid by the debtor bank. The balance of exchange for Dec. 19 was in plaintiff's favor. The City Bank had an exchange account with defendant, but for a month prior to Dec. 19 defendant had required the City Bank to settle its balance each day. On Dec. 19 the City Bank transferred to defendant the draft in question as a payment on its balance due that day. The City Bank stopped business at the close of that day, being insolvent. On the settlement of its exchange account on that day with plaintiff, defendant claimed that the draft should be allowed as a credit. This was refused.

Thomas C. Montgomery, for *applt.*

William F. Cogswell, for *respt.*

Held, That defendant cannot be regarded as having received the draft in good faith and without notice of plaintiff's equities. It received it with notice that it represented an item merely in the exchange account between the City Bank and plaintiff, and that whether anything would be due or payable upon it would depend upon the state of the exchange account between those two banks at the close of the day, and that it was certified for the purpose of being used for the settlement of that account. It does not matter that defendant did not know the actual state of the exchange account between the City Bank and plaintiff.

Judgment of General Term,

affirming judgment for defendant, reversed, and new trial ordered.

Opinion by *Rapallo, J.* All concur.

MUNICIPAL CORPORATIONS. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Eliza Allison, applt., v. The Village of Middletown, resp't.

Decided July, 1887.

The exclusion of evidence to show constructive notice to the corporation of the condition of the street prior to an accident is not erroneous where actual notice is conceded to have been received.

Municipalities are not liable for injuries occurring on lands of adjacent owners because of the icy condition of such lands in the absence of proof that the municipality had exercised authority or supervision over it.

Appeal from judgment in favor of defendant, entered on verdict, and from order denying motion for new trial on the minutes.

Action to recover for damages sustained by plaintiff in consequence of falling on ice accumulated on a sidewalk, as alleged.

Plaintiff had been visiting a friend and fell while leaving the house on her return. There was an open space of five feet between the house and the sidewalk, which was a common dirt walk. Just where she fell was a disputed question on the trial; on a former trial she testified that she fell three or four feet from the steps, and told a witness that it was while she was coming down the steps. A nonsuit on the former trial was reversed by the Court of Appeals

on the ground that the question where she fell should have been submitted to the jury. 23 W. Dig., 149. On this trial the question was submitted to the jury, who found in defendant's favor. There was a well on the premises from which water ran and froze on the walk. An officer of defendant testified that his attention was called to it and he caused the ice to be removed. Plaintiff, to show constructive notice, offered to show the condition of the sidewalk two years previous. The court rejected the offer and restricted the proof to the winter of the accident.

T. A. Read, for applt.

W. F. O'Neill, for resp't.

Held, That plaintiff was not prejudiced by the exclusion of the evidence offered, as actual notice was conceded to have been received. The question to be determined was whether defendant had done its duty in making the place safe for foot passengers, and this issue was sharply presented to the jury in the charge. The charge was unexceptionable and the evidence was ample to sustain the verdict.

Plaintiff offered to show that the walk was flagged four years afterward. This was refused.

Held, No error. That it was immaterial what the city had done in respect to flagging the place where the accident occurred several years after the accident.

Plaintiff requested the court to charge "that if the whole ground was open from the stoop to the curb and used as a common walk

by the village it is for the jury to say whether the village has not by long acquiescence accepted this ground from the steps to the curb as a common walk." Refused.

Held, No error, for the reason that the proof was clear and undisputed that the land belonged to D. and the village had never exercised any acts of ownership over it or held it out to the public as a part of the public thoroughfare. D. had simply failed to place a fence between his land and the sidewalk. Municipalities are not held liable for injuries occurring upon lands of adjacent owners because of the icy condition of such lands in the absence of proof that the municipality had exercised authority or supervision over it. 34 Wis., 608.

Judgment affirmed, with costs.

Opinion by *Pratt, J.*; *Barnard, P.J.*, and *Dykman, J.*, concur.

INTERPLEADER.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Cecilia L. Norton, exrx., *respt.*,
v. The Union Trust Co. of N. Y.,
applt.

Decided June 18, 1887.

A deposit was made with defendant by one N. as trustee. After his death actions to recover the fund were brought by his executrix and by one claiming to be beneficially entitled to the fund. *Held*, That an interpleader was proper.

Appeal from order denying motion for interpleader.

N., in his lifetime, deposited with defendant some \$4,000, "as

trustee," without naming the *cestui que trust*. At his death about \$2,000 of the fund remained on deposit. Plaintiff, as executrix, demanded said balance, and brought this action therefor. One W. also claimed to be the beneficiary of the fund, and after demanding it brought suit therefor, alleging that N., as trustee for her, deposited said money, "the property of" said W. Thereupon defendant moved to interplead said W. and to be discharged upon paying said money into court. The motion was denied, the court holding that the relation between defendant and the depositor was simply that of debtor and creditor, and he being dead the debt is due to his personal representatives; that if W. had any rights to the fund they could be enforced in another action, but that it was not necessary to defendant's protection that there should be an interpleader.

Miller, Peckham & Dixon, for *applt.*

T. H. Baldwin, for *respt.*

Cromwell G. Macy, for W.

Per curiam.—From the facts disclosed upon the papers presented upon this appeal it is apparent that the Trust Co., the defendant herein, cannot determine without hazard to itself to which of the parties claimant the subject matter of this litigation belongs. Under these circumstances, under § 820 of the Code, it is entitled to be relieved from the litigation by depositing the money in court, so that the two hostile claimants may be allowed to litigate their respective claims.

Under the circumstances we think that defendant should be relieved from this litigation and the other claimant brought in, and that therefore the motion for interpleader should have been granted.

Order reversed, with costs, and motion granted.

WHARFAGE. N. Y. CITY.

N. Y. COURT OF APPEALS.

Williams, *respt.*, v. The Mayor, etc., of N. Y. et al., *appls.*

Decided April 19, 1887.

The wharf property of citizens may be taken, but it must be paid for fairly and in the ordinary manner.

Certain water lots to be made land and gained out of the Hudson were conveyed by the city to plaintiff's grantors with the right of wharfage, etc., the grantees to build wharves and all streets through the premises. These conditions were complied with. *Held*, That the grantees were owners of an easement for the approach of vessels in front of their wharves both as against the city and the State, and that plaintiff was entitled to be compensated for the destruction thereof by the appropriation by the city of a portion of the exterior line for a street.

A reservation in the deed of "such streets as may be laid out through the premises" does not include a street laid out by the department of docks, as said department has no power to lay out streets.

Plaintiff claimed to be entitled to be compensated for a strip of land which had been wholly or partly appropriated and used by defendants as a part of the exterior street or walk laid out under the provisions of § 6, of Chap. 574, Laws of 1871, in such a manner as to destroy his wharf rights. Defendants claim that they had a

right to appropriate and use this land without compensating plaintiff. It appeared that in 1858-9 the city of New York conveyed to plaintiff's grantors certain premises in front of which the Harbor Commissioners' line had been established under Chap. 763, Laws of 1857. These conveyances described the property as "All that certain water lot or vacant ground and soil under water, to be made land and gained out of the Hudson * * * and so much thereof as has already been made and gained" in front of said uplands, which were owned by the city, "with the estate, right, title and interest" the city had "or may lawfully claim in the premises," etc., and the right of wharfage accruing in that part of the exterior line of said city lying on the westerly side of the granted premises. The grantees in said conveyances covenanted to build all new wharves and bulkheads and all streets running through or that might be laid out on the premises. The grantees performed their covenants, constructed the wharves on the river line, filled in the space between, built the streets required and entered peacefully into possession of their land and wharf rights.

Frank A. Irish and *James C. Parker*, for *appls.*

Albert A. Boardman, for *respt.*

Held, That plaintiff was entitled to be compensated; that the grantees became owners of the newly made land as well as that already "gained" at the date of the deeds, and owners of an easement for the approach of vessels

in front of their wharves, both as against the city, and against the State.

Chapter 86, Laws of 1813, by which the State granted to the city a general right to build and maintain wharves, piers and slips along its water front, carried with it the right to occupy and possess the lands of the State under water, so far as needed for the construction and maintenance of the wharves it was authorized to build, and involved the grant of so much of the land of the State under water as those wharves would occupy if the city's choice of location required such appropriation. There was no restraint upon this general grant and the ownership involved where the plans carried the wharves on the State lands in the stream, except the limitation of exterior lines beyond which the authority should not go, or that imposed by general plans agreed upon by both parties.

The general grant of authority to build wharves and take their use and product carried with it an easement for the approach of vessels over the land under water of the grantor lying in front, and the State having forbidden by the Act of 1813, after the city had located its dock, any filling or the erection of any structure in its front, and so by its own act incapacitated itself without the assent of its grantee from destroying or obstructing the easement given, and this easement the State could not by its own sole action take away or destroy without awarding adequate compensation.

Chapter 763, Laws of 1857, which moved the wharf or bulkhead line into the stream to what is known as the "Harbor Commissioner's Line," gave to the city under its general right of building wharves authority to locate them upon the land of the State under water at the new line, and also the right to fill up and occupy the intervening space as a necessary incident to the use of and access to the new wharves, and the removal of the exterior bulkhead line carried with it a surrender by the State to the city or its grantees or the upland owners of its land under water behind the new wharves whenever they should be constructed.

The deeds to plaintiff's grantors reserved to the city "such streets as now are or hereafter may be laid out through the premises" conveyed. It was claimed that a new river street 250 feet wide and absorbing 13th avenue and all the land west of it to the river was laid out by the department of docks.

Held, That as said department had no power to lay out streets, therefore this was not a case within the reservation.

The wharf property of citizens may be taken, but it must be paid for fairly and in the ordinary manner.

Judgment of the General Term, for plaintiff on case submitted, affirmed.

Opinion by *Finch, J.* All concur, except *Rapallo, J.*, not voting.

EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John Garwood, *respt.*, v. The N. Y. C. & H. R. RR. Co., *applt.*

Decided June, 1887.

In an action for damages for diverting the waters of a stream from plaintiff's mill a witness otherwise competent may give his opinion of the rental value of a mill so situated, and of what it would be if the water diverted had been permitted to flow undiverted from day to day into plaintiff's pond.

In such a case a practical miller on the same stream, somewhat familiar with plaintiff's mill and its operation, and having some knowledge of the price for which mills sold, and of the effect of the withdrawal of the water from the mill upon its grinding capacity, though not a civil or hydraulic engineer, is a competent witness to express his opinion.

It is proper for a millwright acquainted with the mill and wheels and defendant's pumps, having stated what quantity of water the pumps if continuously operated would take from the stream, to state the grinding capacity of the water so taken if at plaintiff's mill.

It is proper for such millwright in making computations of such grinding capacity to use tables prepared by others which were ordinarily used by millwrights, and by all such considered accurate.

Appeal from judgment entered on verdict and from order denying motion for a new trial on a case and exceptions.

This action was brought in April, 1883, to recover damages alleged to have been sustained by plaintiff by reason of the diversion of the waters of the Tonawanda creek subsequent to March, 1879. Plaintiff had a grist and flour mill supplied and operated by the waters from the creek about three miles

below where defendant had pumps located by which it raised water from the creek into a reservoir or tank to supply its locomotives. It appeared that during the dry season of the year for about four months annually the creek is not capable of furnishing water sufficient to operate plaintiff's mill but a short time daily, and it was claimed that the deficiency is increased and the use of the mill impaired by this divergence. And the evidence tends to prove that the water so diverted and taken from the creek by defendant would furnish head in plaintiff's mill pond sufficient to have enabled him to grind at his mill from six to eight bushels of wheat daily. This was disputed by the evidence of defendant. This action is between the same parties and for a like cause of action as that reported in 83 N. Y., 400. And the questions in this case mainly arise upon exceptions taken to the reception and rejection of evidence.

After giving some evidence tending to prove the quantity of water daily pumped from the creek and its effect upon the grinding capacity of the mill, a witness was asked to give his opinion of the rental value of the mill in view of the situation, and of its rental value during the years in question if water had been added to the pond distributed through each day of year sufficient to grind six bushels of wheat. To the introduction of which defendant took objections and exceptions; that the witness did not appear competent to express an opinion, and there

was no basis shown upon which to predicate it.

Green, McMillan & Gluck, for applt.

James Breck Perkins, for respt.

Held, That as there was some evidence, though by no means conclusive, from which the jury might find that the grinding capacity of the mill was diminished to the extent embraced in the inquiry by the diversion complained of, and the witness, although not a hydraulic or civil engineer, was a practical miller on the creek and was somewhat familiar with plaintiff's mill and its operation, and had some information of the price for which mills were sold, we think he was within the rule of competency required to express his opinion.

A witness, a millwright acquainted with the mill, its wheels and efficiency, and with defendant's pumps, having stated what quantity of water the pumps continuously operated would take from the creek, was asked to state the grinding capacity of the water at this mill if it had been permitted to flow into plaintiff's pond distributed through each day of the year, which he was permitted to state under objection and exception, taken by the defendant's counsel, on the ground that there was no foundation laid for the evidence.

Held, That while it is true that it had not appeared that the two pumps were continuously in operation, it was not error to receive the evidence. It then appeared that the pumps were operated to

supply defendant's reservoir for the purpose mentioned, and it was not incompetent to show as one fact what the means provided enabled defendant to accomplish, although the question simply was, what quantity of water was actually taken from the creek and the effect of its abstraction upon the working capacity of the mill and its consequences.

That the evidence that Leffel's tables used by the witness in making computations of the quantity of grain ground by a specified power were ordinarily used by millwrights, and by all of them considered accurate, made the computations based on them competent. We think the united acquiescence of millwrights in the accuracy of these tables and result of the computation predicated upon them may be treated as the common knowledge of men of that profession, and hence the computation based on them competent evidence. 55 N. Y., 592; 78 id., 114.

Judgment and order affirmed.

Opinion by *Bradley, J.; Smith, P.J.*, concurs; *Haight, J.*, not sitting.

CHARTER PARTY. PAYMENT.

N. Y. COURT OF APPEALS.

Holdsworth, applt., v. *Belaunzaran et al.*, *respts.*

Decided June 7, 1887.

By the terms of a charter party a portion of the freight was to be paid at Cadiz in cash. Upon arriving there the master of the vessel, although knowing that the charterer's agent at that place had suffi-

cient moneys of theirs in his hands with which to pay the freight, for convenience in remitting the same to the owners, allowed such agent to undertake to procure a draft for him and forward the same to them, and relied upon the statement of such agent that he had done so without investigation. Such agent did not procure a good draft, but drew an unauthorized draft on the charterers, having at that time no money in their hands, and such draft when presented was dishonored. *Held*, That the master was entitled to recover the freight for which the draft was taken; that there was no payment of the debt.

Reversing S. C., 21 W. Dig., 127.

In Nov., 1881, defendants chartered a vessel for a voyage from New York to Cadiz and for its return to New York. The charter party provided that the defendants should pay plaintiff £1,100 for the round trip, £620 of which were made due and payable upon proper delivery of the cargo at Cadiz "in Spanish gold coin at the rate of \$4.80 to the pound sterling;" "all payments to be made in cash without credit, discount or commission." Full performance by plaintiff of the obligations was admitted by defendants. Before leaving New York defendants handed to plaintiff a letter of instruction, by which he was to proceed directly to Gibraltar, consigning himself to one Gomez, and after discharging the consignments at that place to proceed to Cadiz, consigning himself to Podgio Bros., who, it was stated, had full instructions to serve the master in any matter concerning the vessel. After arriving at Cadiz the Podgio Bros. proposed to the master of the vessel that they should pay only a part of the cash payable there and

falsely represented that they had bought a bill of exchange for the balance and remitted it to the master's principals. The master accepted the proposition and the Podgios remitted a draft drawn by themselves on their own principals, which was afterward dishonored. When the master of the vessel learned after the voyage what the Podgio Bros. had done, he neither approved of nor accepted the method of remittance. This action was brought to recover of the charterer the amount of the draft which had been dishonored.

Joseph A. Shoudy, for applt.

George L. Rivers, for respts.

Held, That plaintiff was entitled to recover, defendants' liability for the amount claimed never having been discharged. Defendants' contract was to pay plaintiff at Cadiz a certain sum, and plaintiff having shown that he had afforded defendants' agents there an opportunity to do so, and they having declined, there was a breach of contract on the part of defendants which rendered them liable for the sum unpaid.

Plaintiff's assent to a mode of payment which was not pursued, and the condition upon which such assent was given never having been performed, did not constitute in any sense a payment of the principals' debt.

Order of General Term, reversing judgment for plaintiff on report of referee, reversed, and judgment for plaintiff affirmed.

Opinion by *Ruger, Ch. J.* All concur, except *Earl* and *Peckham, JJ.*, dissenting.

CHATTEL MORTGAGE. SATISFACTION.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Frank Burns, *applt.*, v. Devine M. Munger, *respt.*

Decided June, 1887.

The provisions of an agreement are entitled to a reasonable interpretation, and to that end reference may be had to the purpose in view, to ascertain the intention of the parties.

Where the purpose in view in an agreement for the sale of a canal boat which had been incumbered by chattel mortgages, is that the vendor vest the vendee with a perfect title to it clear of incumbrance, it could not have been contemplated that any entry be made in the books of the auditor not authorized by statute, and all liens and mortgages are nullified when a perfect title is transferred, and when that is effectually done, the caprice of the vendee cannot properly take the place of satisfaction on his part.

When a chattel mortgage which is a first lien on personal property is foreclosed by sale of the mortgaged property, such foreclosure cuts off as effectually the lien of junior mortgages as a formal discharge of such mortgages by the mortgages; and in either case there would be no change of the apparent situation on the records of the auditor's office, but the fact of satisfaction would have to appear *aliunde* the record.

Appeal from judgment entered upon report of a referee.

Action to recover the purchase price of a canal boat sold by one Collins to defendant and alleged to be due and payable to plaintiff who is the assignee of the claim. The action is upon the following agreement: "New York, April 28, 1880. In consideration of Patrick Collins delivering to me a perfect title to the canal boat H. M. Sabey and clearing up the record title

to the same, nullifying all liens, mortgages, etc., to my satisfaction, I will pay to the order of said Patrick Collins and on delivery of all the papers necessary to properly transfer said boat to me or to my order, the sum of one thousand dollars, D. M. Munger." The referee found that this agreement was on the 28th of April, 1880, executed and delivered by this defendant to Collins; and that on April 29, 1880, Collins delivered the boat and a bill of sale of it, duly executed by him to defendant or to his agent; and that although the name of the purchaser in the bill of sale was left blank, it and the boat "were so delivered with the intent to convey title to the said boat to the purchaser." The referee also found that the condition in the agreement of April 28, providing for clearing up the record title, nullifying all liens, mortgages, etc., to the satisfaction of defendant had not been performed, and directed judgment for defendant. This conclusion is based upon the further facts found by him, that one Glenn being the owner of the boat sold it to Helen Herring in Aug., 1877, and took from her a chattel mortgage upon the same for \$1,550, of the purchase money; that in pursuance to the mortgage the boat was taken from the possession of the mortgagor, the sale of it duly advertised and on July 24, 1879, sold at public auction to Collins, who took the boat and held it until the delivery of it to defendant or to his agent, April 29, 1880; that after the purchase

of the boat and in May, 1878, and 1879 Herring made to Ryan and Hogan respectively mortgages upon it which were filed in the office of the auditor of the canal department; that the mortgage of Ryan was renewed by filing a copy in 1879 and not after, and that the mortgage to Hogan was in like manner renewed annually to and including 1881. There is no finding that the lien of these two mortgages or of either of them continued on the boat after the sale on the prior or purchase money mortgage.

F. Brundage, for applt.

William Nathaniel Cogswell, for resp't.

Held, That it must be assumed for the purposes of this review that by the sale of the boat to defendant and the delivery of it and the bill of sale he took title free and clear from all liens. That the purpose of the parties to the agreement of sale was to vest in defendant a perfect title to the boat, and to that end the provision of the contract as to title was inserted by defendant in the agreement containing his promise to pay. It is entitled to a reasonable interpretation, and some reference may be had to the purpose in view to ascertain the intention of the parties in making and taking the agreement.

That the statute furnishes no provision for making the discharges of chattel mortgages from the record. It is provided that they may be filed with the auditor, and that entry be made in a book kept in his office in a manner specified

by law. Laws of 1864, Chap. 412. It could not be contemplated that any entry be made in the books of the auditor not authorized by statute. The consideration upon which defendant agreed to pay the purchase price was that Collins should deliver the papers necessary to transfer the boat to defendant and deliver to him a perfect title to it, and the liens and mortgages were nullified when a perfect title was transferred. There could remain no record title, or title on the record in the application of that term to personal property. The clearing up of the title seems to be all that was required to accomplish what was within the meaning of the agreement, and when it was effectually done the caprice of defendant cannot properly take the place of satisfaction on his part.

That the foreclosure and sale of the boat on the purchase money mortgage, which was properly filed and registered before the execution and filing and registry of the two junior mortgages, cut off the lien of those mortgages, and a formal discharge of those mortgages by the mortgagees would not change the apparent situation of the record in the auditor's office, but the fact of satisfaction would have to appear *aliunde* the record and the record title, if it may be called such, represented by those two mortgages and the filing and registry of them was cleared up so far as practicable and as effectually as if discharges had been executed by the mortgagees. 69 N. Y., 69; 40 Hun, 256.

Our conclusion that a new trial should be granted is reached upon the assumption, which we think the facts as found by the referee require, that a perfect title passed by the sale in question.

Judgment reversed and new trial ordered, costs to abide the event.

Opinion by *Bradley, J.; Smith, P.J.*, and *Haight, J.*, concur.

COVENANT. DAMAGES.

N. Y. COURT OF APPEALS.

Wilcox, respt., v. Campbell, applt.

Decided July 1, 1887.

Where the owner of a parcel of land encumbered by two mortgages, for both of which he was also personally liable, conveyed a portion to defendant, who assumed and agreed to pay them as a part of the purchase price, and afterward conveyed the remainder to B. by a quit claim deed, and upon default in payment the mortgages were foreclosed and the whole parcel sold to satisfy the mortgage debts, *Held*, That B was entitled to maintain an action upon the covenant to recover the value of the parcel lost to him by reason of defendant's failure to pay the mortgages and the consequent foreclosure sale.

Affirming S. C., 20 W. Dig., 471.

This was an action brought by plaintiff to recover damages accruing on the sale of certain lands belonging to W. It appeared that prior to Nov. 9, 1874, one C. owned certain lands which he had mortgaged for \$3,000. On that day C. conveyed the land to W. subject to the mortgage and she assumed payment thereof. At the same time W. executed to C. a mortgage to secure a portion of the purchase

price. On Feb. 12, 1877, W. executed to defendant a deed of a portion of the land, subject to the two mortgages which defendant assumed and agreed to pay as part of the purchase price. On Aug. 26, 1878, W. conveyed the remainder of the land to B. by a quit-claim deed which made no mention of the mortgages and expressed a consideration of one dollar. Some time in 1878 the Savings Bank commenced a foreclosure of its mortgage upon the entire parcel, and on Feb. 12, 1879, the whole parcel of land was sold, all of the proceeds being used to satisfy the mortgages. Subsequently B., by a written instrument, for a valuable consideration, assigned to plaintiff his claim for damages and all his causes of action against defendant by reason of his failure to pay the mortgages.

J. A. Stull, for applt.

Q. Van Voorhis, for respt.

Held, That plaintiff was entitled to recover; that after the conveyance by W. to defendant he became the principal debtor to the mortgagees, and W. remained simply surety for him, and everyone having notice of the relation between them was bound to respect it. The parcel of land conveyed to defendant was primarily liable for the payment of the two mortgages, and the balance of the land was secondarily liable and simply remained security for the payment of the defendant's obligations, 93 N. Y., 201; that B. was not under any obligation to defendant to take any steps in the foreclosure action, and if by de-

fendant's default he was deprived of his land the value of the land is the fair measure of his claim against defendant.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Earl, J.* All concur.

MANDAMUS. SUPERVISORS.
N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

The People ex rel. Wm. R. Mason, *respt.*, v. The Board of Supervisors of Wayne County, *applt.*

Decided June, 1887.

Where a bill presented to the board of supervisors for audit and allowance is defective and insufficient in not being made out in conformity with the statutory requirements, the board may be compelled by mandamus to permit and allow the claimant to amend and correct his bill accordingly.

Appeal from order granting a peremptory writ of mandamus.

The relator, a justice of the peace, presented a bill for services in criminal proceedings to town auditors for audit and allowance, who audited and allowed the same. Appeal was thereupon taken to the board of supervisors, and the claim was referred to a special committee. Objections being raised that the bill was informal in not specifying the names, etc. of the complainant in each case, and that it was not made out and verified according to the statute, the relator asked the privilege of withdrawing the bill for correction and amendment. Thereupon the

committee reported these facts to the board which passed this resolution: "Resolved, that the privilege of withdrawing and modifying the bills considered by the special committee for the town of Lyons be denied." The committee then reported against the allowance of the bill, which report was confirmed.

Relator then moved for a mandamus commanding the supervisors to permit him to amend and correct any informality in his bill, and to amend the same by stating the name and residence of the complainant in each case, the offense charged, etc., etc. Mandamus was granted accordingly.

T. W. Collins, for *applt.*

John H. Camp, for *respt.*

Held, That the relator had the right to correct and amend his bill, and the supervisors unjustly and illegally refused him such privilege.

The bill was not made out in compliance with the requirements of the statute and the supervisors very properly refused to audit it in that form; but the fact that claimants have presented informal bills to the board for audit is not a reason for absolutely rejecting their claim and thus deprive them of that which may be honestly and fairly due them. By permitting an amendment the relator could present his claim in the form and manner prescribed by the statute, and then the board could examine and pass upon the various items embraced therein, doing justice to all parties.

It is contended that the board have no power to allow a claim to

be withdrawn. Laws of 1845, Chap. 180, § 28. But no withdrawal of the account was necessary, nor was it asked for in the notice of motion herein. All the relief the relator wanted or was entitled to was leave to amend. The writ exceeds the notice of motion in directing that the relator be permitted to withdraw his bill, and it should be modified accordingly.

Writ modified and order affirmed.

Opinion by *Haight, J.; Smith, P. J., and Bradley, J.*, concur.

APPEAL. DEPOSITIONS.

N. Y. COURT OF APPEALS.

Jenkins, respt., v. Putnam, applt.

Decided June 28, 1887.

An order vacating an order for the examination of a plaintiff before trial is not reviewable in the Court of Appeals. Section 873 is not absolutely mandatory and was not intended to deprive the judge of all discretion.

An affidavit for such order must show that the facts are not perfectly known to the defendant and that it is important for him to have the testimony of plaintiff before trial or reason to apprehend that he could not have his examination on the trial.

See S. C., 26 W. Dig., 155.

This action was brought to recover for plaintiff's services and expenditures in the sale of certain real estate for defendant. Defendant, desiring to examine plaintiff before trial, presented to a justice of the Supreme Court an affidavit which alleged that the action was brought to recover for services and expenditures alleged by plaintiff

to have been rendered and incurred in the sale of certain real estate upon the employment of defendant, and which services plaintiff alleges were worth \$300, and that judgment for \$300, besides costs, was demanded; that an answer to the complaint had been served in which each and every allegation thereof was denied. The affidavit further alleged that "the testimony of said plaintiff is material and necessary for the defendant and for the defense of said action; that said plaintiff has knowledge of all the facts and circumstances relating to his alleged employment by defendant and his alleged sale of said real estate, and deponent expects to prove by said plaintiff that he was not employed by defendant as alleged in said complaint, and that he did not in fact sell the said real estate." An order was made requiring plaintiff to appear before a referee named for the purpose of being examined, and to have his deposition taken in the action. Upon a motion subsequently made by plaintiff at Special Term, the same judge who granted the order there presiding, vacated and set it aside. This order was affirmed by the General Term.

Charles S. Lester, for applt.

John L. Henning, for respt.

Held, That the order was not reviewable here; that the granting of the application rested in the discretion of the court; that while § 873 of the Code provides that the judge "must" grant the order where an affidavit conforming to the requirements of § 872 is pre-

sented to him, yet the language is not absolutely mandatory and it was not intended to deprive the judge of all discretion. The affidavit must disclose the nature of the action, and that the testimony is material and necessary.

Also held, That the affidavit in this case was defective, because it did not contain an allegation showing that the facts were not perfectly known to the defendant, or that it was important for him to have the testimony of the plaintiff before the trial, or that he had reason to apprehend that he could not have his examination at the trial.

Appeal dismissed.

Opinion by *Earl, J.* All concur, except *Rapallo, J.*, dissenting.

LEASE. COSTS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Susan A. Newman, *respt.*, v. Robert T. French et al., *appls.*

Decided June, 1887.

The lessor's covenant to repair is independent of the lessee's covenant to pay the rent, and the fulfillment thereof is not a condition precedent to the obligation of the lessee, but the damages resulting from a breach of the covenant may be set up as a counterclaim in an action for the rent.

Where a motion for a new trial is made upon the minutes, motion costs only are allowable.

Appeal from order granting a new trial upon motion made upon the minutes of the justice, after a verdict directed in favor of defendant.

Action for rent upon a lease, in which plaintiff covenanted to keep the buildings in good repair and condition for the purposes of the business connected therewith. The answer alleged that one of the buildings was afterward destroyed by fire, without defendants' fault, and that plaintiff refused to rebuild. The answer also contained a counterclaim in which defendants demanded an affirmative judgment. Plaintiff's reply alleged that said fire originated solely through the gross carelessness of defendants, etc.

The court directed a verdict upon the pleadings in favor of defendants for the amount due upon their counterclaim. But the court granted a new trial, upon the ground that plaintiff's covenant to repair was independent of defendants' covenant to pay rent, and that it was error for the court to hold that performance by the lessor was a condition precedent to any liability on the part of defendants for rent.

W. H. Kenyon, for *appls.*

W. T. Hubbell, for *respt.*

Held, That the decision of the court below in granting a new trial upon the ground stated was correct.

In *Allen v. Culver*, 3 Denio, 284, it was held that the covenants to pay rent and to repair were independent, and that the lessee was bound to pay a proportionate part of the rent on account of the buildings remaining uninjured, notwithstanding the default in rebuilding.

In *Whitbeck v. Skinner*, 7 Hill,

53, it was held that in *assumpsit* to recover rent the tenant may avail himself of a breach of the landlord's agreement by way of recoupment, though not as a set-off. In *Speckels v. Sax*, 1 E. D. Smith, 253, it was held that although the terms of a lease bind the landlord to repair, his neglect to do so will not authorize the tenant's abandonment of the premises, unless by the terms of the agreement the repairs were made a condition precedent to the obligation to occupy; that the landlord's failure to repair will not amount to an eviction, but only to a breach of covenant.

Held in *Myers v. Barns*, 35 N. Y. 269, that in an action for rent the defendant can, under a covenant of the landlord to keep the premises in repair, set up as a counterclaim the amount expended by him in necessary repairs; and also damages sustained by the loss of the use of certain parts of the premises rendered untenable for want of repair.

In *Kelsey v. Ward*, 38 N. Y., 83, affirming 16 Abb., 98, held that an action for rent is not barred by the failure of the lessor to fully perform his contract, where the lessee enters into possession and occupies the premises; that the remedy of the lessee is by recouping from the rent such damages as he may have sustained by failure of the lessor to fulfill his contract, or to bring a separate action for such damages.

See also 1 Thomp. & C., 116; 56 N. Y., 420; 39 N. Y. Superior Ct., 109; 4 Barb., 256; 3 Johns., 44.

These authorities seem to sustain the decision of the trial court in granting a new trial.

Where a motion for a new trial is made upon the minutes, motion costs only are allowable. 3 Wait's Prac., 512.

Order affirmed.

Opinion by *Haight, J.; Smith, P. J.*, and *Bradley, J.*, concur.

INTEREST. JUDGMENT.

N. Y. COURT OF APPEALS.

Wells, Fargo & Co., respt., v. Davy, applt.

Decided May 10, 1887.

In an action upon a judgment interest is given not upon the principle of implied contract, but as damages for delay in performing the obligation, and only the lawful rate can be recovered.

This action was brought upon a judgment recovered by plaintiff in Utah in 1877. The judgment was for a sum specified "with interest thereon at the rate of ten per cent. per annum from" its date. It was proved upon the trial that by the laws of Utah, unless the rate of interest was stated or agreed upon, ten per cent. was the lawful rate.

Henry A. Root, for applt.

W. B. Smith, for respt.

Held, That plaintiff was not entitled to recover interest at the rate of ten per cent., but at the rate of seven per cent. until the Act of 1879 (Chap. 538) reducing the rate of interest to six per cent. and after that at that rate. Interest is given upon a judgment not on the principle of implied contract,

but as damages for delay in performing the obligation, and only the lawful rate can be recovered. 84 N. Y., 471; 86 id., 401; 95 id., 667, 428; 136 Mass., 344.

An objection to evidence which, if taken in time, could be obviated cannot prevail when raised for the first time in the Appellate Court.

Judgment of General Term, affirming judgment for plaintiff, modified by reducing interest allowed, and as modified affirmed.

Opinion by *Danforth, J.* All concur, except *Earl* and *Finch, JJ.*, who vote for general affirmance.

CERTIORARI. BASTARDY. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The People ex rel. Fred. B. Wright v. The Superintendent of the Poor of Ontario County.

Decided June, 1887.

Upon the return of a writ of *certiorari* the court may examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated.

But the proceedings will not be annulled by reason of errors in the admission or rejection of evidence only, provided no rule of law affecting the rights of the parties has been violated to the prejudice of the relator, and where there is any competent proof of all the facts necessary to be proved in order to authorize the determination.

The mother of an alleged bastard testified that she was a married woman, but had not seen her husband in eight years, and never heard of his having died. *Held*, That a mother of a bastard is not com-

petent to establish the fact of non-access of her husband for the period of one year prior to its birth.

Certiorari to the Court of Sessions to review bastardy proceedings.

By order of affiliation made by two magistrates relator was adjudged to be the father of a bastard child, which order was affirmed by the Court of Sessions. Whereupon, and on application to Special Term a *certiorari* was issued to the Court of Sessions requiring the court to return all of the proceedings to this court. This was the proper practice (see 29 Hun, 47) until the Code of Crim. Pro. was amended in 1884, Chap. 372, abolishing the writ of *certiorari* as a mode of reviewing special proceedings of a criminal nature. §§ 515, 749, 770, 771. But the counsel consented that the court might review the proceedings with the same force and effect as if the writ had not been abolished.

Respondent contends that the facts are not brought before the court for review; that the court can only consider whether some proof was given tending to establish the material allegations in issue.

E. W. Gardner, for relator.

Edwin Hicks and *H. M. Field*, for deft.

Held, That upon the return to a writ of *certiorari* the court may examine the evidence and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it,

any rule of law affecting the rights of the parties has been violated. 45 N. Y., 772.

In *people, ex rel. v. Eddy*, 57 Barb., 601, it was held that the proceedings will be reversed if the moving party, upon his own showing, fail legally to make out his case, or if the testimony fails to support the matter charged. That where some evidence is given to support the charge, however slight, if judgment be given thereon, and where there is evidence upon the merits upon both sides, the court will not reverse, unless the case be one in which the weight of evidence is very greatly preponderating, or so strikingly so as to create a suspicion of injustice arising from prejudice or passion. In the revisers' note to § 2140, Code Civ. Pro., we are told that this section was framed to settle the law as to the questions to be reviewed under the writ, and that it was intended to embody the rule laid down in the cases above referred to. Whilst these provisions of the Code are limited to civil actions and proceedings, and were not intended to have any application in criminal proceedings, still the section quoted appears to have been a legislative approval of the rule laid down in the cases cited, and they should therefore form our guide in determining the questions involved in this case.

Some evidence was received which should have been excluded as incompetent.

Held, That the proceedings will not be annulled by reason of errors in the admission or rejection

of evidence only, provided no rule of law affecting the rights of the parties has been violated to the prejudice of the relator, and where there is any competent proof of all the facts necessary to be proved in order to authorize the determination. 29 Hun, 125. But if there is no competent proof of a fact necessary to be proven, then the proceedings must be reversed.

The prosecutrix testified as to having intercourse with the relator, etc. On cross examination she testified that she was a married woman, but had not seen her husband in eight years, and never heard of his having died. Objection to question overruled.

Held, Error. That the mother of the bastard was not competent to establish the fact of non-access of her husband for the period of one year prior to the birth of the child. At common law this evidence was incompetent; public morals and public decency would not permit a wife to testify to any fact tending to show her own child to be illegitimate. 1 Whart. Evid., § 608. In *People ex rel. Crandall v. Overseers of the Poor*, 15 Barb., 286, this evidence was held to be incompetent and did not establish the fact that the husband had been absent a year. The common law rule has not been abrogated by §§ 828, 831, Code Civ. Pro. 23 N. Y., 85.

Proceedings reversed and remitted to the Court of Sessions for a rehearing.

Opinion by *Haight, J.*; *Smith, P.J.* concurs; *Bradley, J.* concurs in result.

FIRE INSURANCE.

N. Y. COURT OF APPEALS.

Bennett, *respt.*, v. The Agricultural Ins. Co., *applt.*

Decided June 21, 1887.

Plaintiff in applying for insurance stated that the house was unoccupied, but defendant's agent entered the statement incorrectly, and plaintiff signed the application without reading it. The agent had been accustomed to fill in the answers to defendant's knowledge. *Held*, That the agent's error could not be imputed to plaintiff.

A condition in a policy that it should be void if the premises ceased to be occupied does not apply to a risk taken on an unoccupied house.

Affirming S. C., 20 W. Dig., 208.

This was an action upon a policy of insurance issued by defendant. The defense interposed was a statement in the application for insurance that the house at the time was occupied as a residence by a tenant, when in fact it was vacant and unoccupied. Plaintiff swore that the application was taken by K., defendant's solicitor and agent; that K. furnished the printed form of application used by defendant and asked the questions, entering in writing in blanks in the form plaintiff's answers; that although plaintiff told K. the house was unoccupied but that when occupied it was occupied by a tenant or hired man, K. entered it incorrectly, and that plaintiff, supposing his answers had been correctly entered, signed the application without noticing the misstatements. The evidence as to what occurred was conflicting, but the referee found in favor of the plaintiff, whose testimony was

corroborated by several witnesses, and this finding was sustained by the General Term. K. had been accustomed, with defendant's knowledge, to fill in the answers of applicants for insurance in the printed forms used by the company.

A. H. Sawyer, for *applt.*

D. A. King, for *respt.*

Held, That K.'s error in incorrectly inserting plaintiff's answers cannot be imputed to plaintiff or deprive him of the benefit of the policy; that the misstatements in the application, as between the parties, were those of defendant's agent and did not constitute a breach of warranty by the assured. 36 N. Y., 550; 78 *id.*, 568; 80 *id.*, 291.

Defendant claimed that although the house was insured as unoccupied, that as plaintiff afterward, during the life of the policy, occupied it for a time by a tenant, he could not thereafter discontinue the occupation and leave the premises vacant without forfeiting the policy. The policy contained a clause that if the premises insured ceased to be occupied in the usual and ordinary way, or were so unoccupied when the insurance was effected, and not so stated in the application, that the policy should be void until the written consent of the company at the home office is obtained.

Held, That this condition was intended to protect the company against an increase of risk, by leaving premises vacant which were occupied when the insurance was effected, and did not apply to

a risk taken on an unoccupied building; that the fact of non-occupation was stated in the application as reformed and was known to defendant's agent, and as between defendant and plaintiff it must be deemed to have been stated.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Andrews, J.* All concur.

MECHANIC'S LIEN. AGENCY.
N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

Andrew Zeigler, *respt.* v. Letitia J. Galvin, *applt.*

Decided June, 1887.

Under Chap. 140, Laws of 1880 (relating only to the city of Buffalo), it is not sufficient to establish a lien to show that the work has been performed or the materials furnished with the knowledge or consent of the owner of the premises, but it must be "by virtue of a contract with the owner thereof, or his agent."

The court found as facts, that husband and wife were living together upon her premises, and that, with her knowledge, consent and approval, he entered into a contract in his own name for the building of an addition to the house; that she had no separate business or income, nor did she assume or promise to pay for the improvements. *Held*, That a conclusion of law that the husband was the wife's agent in contracting for the improvements was not warranted by the findings of fact.

Appeal from judgment entered upon decision of Erie County Court.

Action to foreclose a mechanic's lien. Defendant was the owner of a house and lot in Buffalo, and

her husband contracted for repairs and improvements to be made. Plaintiff was a sub contractor. The court found as facts, that the contract was made by her husband with her knowledge, consent and approval, and in pursuance of her desire that more room should be added to the house; that she knew the improvements were being made, and was desirous they should be made; that her husband resided upon the premises with his family, which he wholly provided for and maintained, and that she had no separate business or income, nor did she assume or promise personally to pay for any part of the improvements; that her husband intended to carry out the contract himself and to pay the consideration therein named according to the terms of the contract, and that she did not expect or intend to pay any part thereof herself. Conclusion of law, that plaintiff's husband was her agent, etc.

W. L. Marcy, for *applt.*

N. W. Norton, for *respt.*

Held, That the conclusion of law was inconsistent with the findings of fact.

Plaintiff's consent and approval that the improvements should be made is not, of itself alone, sufficient to constitute an agency. The findings are inconsistent with the theory that she was acting as principal and her husband as agent. For if her husband was agent and she principal, she would become bound by the contract and would be obliged to pay the amount that became due thereon. The fact

that she did not expect nor intend to pay herself, but that her husband did, tends strongly to show that the husband contracted as principal and not as agent. If she had no separate business or income she may have had nothing with which she could pay the contractor, and the property might be sold in consequence. Her husband had the right, with her consent, to rebuild and improve the premises at his own expense, for the comfort and convenience of himself and family, and to contract for himself alone, without involving his wife.

Held further, That under Chap. 140, Laws of 1880 (relating to the city of Buffalo), it is not sufficient that the work has been performed or the materials furnished with the knowledge or consent of the owner of the premises, but it must be "by virtue of a contract with the owner thereof or his agent," to entitle the claimant to a lien.

The language of the general act of 1844, Chap. 305, is identically the same with this, and in *Jones v. Walker*, 63 N. Y., 612, it was held that no lien could be perfected as the work was not performed or materials furnished under any contract with the owner or her agent. That case resembles the present in many of its essential features. See also 94 N. Y., 394.

In *Otis v. Dodd*, 90 N. Y., 336; *Burkitt v. Harper*, 79 N. Y., 273; *Husted v. Mathes*, 77 N. Y., 388, and kindred cases, the statute provided for a lien where the work was performed, etc., with the *consent* of the owner, and for this

reason they are distinguishable from *Jones v. Walker*, upon the ground of the different wording of the statutes under which the lien was asserted.

Judgment reversed and new trial ordered.

Opinion by *Haight, J.; Smith, P.J.*, and *Bradley, J.*, concur.

CORPORATIONS. STOCK-HOLDERS.

N. Y. COURT OF APPEALS.

Christensen, respt., v. *Elno*, *impl'd.*, *applt.*

Decided June 7, 1887.

The liability of a shareholder to pay for stock does not arise out of his relation, but depends on his contract or upon some statute, and in the absence of these grounds of liability he does not make himself liable to pay the face of the shares as upon a subscription.

Certain stock was issued to defendant which was credited as part paid although not in fact paid. He paid the balance. *Held*, That the transaction, as between him and the corporation, was binding, and that the amount so credited did not constitute a trust fund for payment of creditors and could not be reached by a creditor.

Reversing S. C., 21 W. Dig., 202.

This action was brought by plaintiff, a judgment creditor of the Ill. & St. L. Bridge Co., against it and the defendant E., to compel the latter to pay 40 per cent. of the par value of twenty-five shares of the stock of the corporation defendant which had been issued to E. and upon which said 40 per cent. had never been paid, but at the time of issuing of said stock was credited as paid. Plaintiff also sought to compel E.

to account for and pay over the proceeds of certain second mortgage bonds of said company received as his share on the gratuitous distribution of the same among stockholders. It appeared that the credit of the 40 per cent. on the stock and the transfer of the bonds were intended as a gratuity to the stockholders who had been called upon to pay calls on their original subscriptions in excess of what was expected and of what was represented would be necessary at the commencement of the enterprise.

William Man, for applt.

C. E. Tracey, for resp't.

Held, That as between the corporation and its stockholders these transactions were binding according to the actual intention; that the 40 per cent. credited on the twenty-five shares of stock issued to E. cannot be considered as and does not constitute a trust fund applicable to the payment of creditors; that assuming that the transaction was as to the company *ultra vires*, or that it could not give away its shares, it was simply a nullity and E. got nothing as against any one entitled to question the transaction. It did not convert E. into a debtor of the company for the 40 per cent.

The unissued shares of a corporation are not assets.

The liability of a shareholder to pay for stock does not arise out of his relation, but depends upon his contract express or implied, or upon some statute, and in the absence of either of these grounds of liability a person to whom shares

have been issued as a gratuity has not by accepting them committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares as upon a subscription or contract. 26 N. Y., 134; L. R., 7 Ch. D., 115; L. R., 2 H. L., 29.

This is not a case of following assets of a corporation wrongfully transferred.

No trust relation exists between a stockholder in a corporation and its creditors.

A statutory remedy given by another State to a creditor of a corporation cannot be availed of in this State. 46 N. Y., 120.

Judgment of General Term, affirming judgment for plaintiff, reversed, and new trial ordered.

Opinion by *Andrews, J.* All concur.

FALSE REPRESENTATIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The Estey Mfg. Co., *applt.*, v. Elmer Waring, *resp't.*

Decided April, 1887.

A purchaser of goods represented to the seller's agent that he was worth between \$3,000 and \$4,000 above all liabilities, that his stock of goods was free from incumbrance, and that all he owed he owed to J. S., whom he introduced. J. S. was a creditor for \$2,800, and an accommodation endorser, for \$3,000, and held mortgages on the stock as security, which were duly filed; and there were other debts amounting to \$2,265. The price of the goods sold was \$222. Five weeks afterward J. S. purchased the whole stock, and in payment discharged the mortgages and assumed payment of the accommodation notes, and paid T. \$1,500 in cash. The statement of T. was false,

and his entire assets at the time was no greater than the amount of his liabilities. *Held*, That as the verdict was for defendant, an attaching creditor, it must be assumed that the justice failed to find any fraudulent intention on the part of the purchaser in making the misrepresentation as to his financial ability; and as the question of fraudulent intent in cases of this character is ordinarily one of fact, the determination of the justice could not, in such a case as this, be set aside as being against the weight of evidence.

Appeal from a judgment of County Court affirming a justice's judgment.

Replevin. Defendant, as constable, attached the goods in an action by McK. against T.

Plaintiff's agent, on March 13, 1885, received an order from T. for these goods, price \$222, for which credit was given, and the goods were accordingly shipped to T. The agent testified that T. said he was worth, above all liabilities, \$3,000 or \$4,000, and that all his stock was free of incumbrance; that all the debts he owed he owed to J. S., who was present and introduced. T. was then indebted to J. S. \$2,800, who was also his endorser for \$3,000, and held mortgages upon the goods as security, which were on file; to Z., \$2,100; McK., \$165. The stock of goods on hand was in value about equal to the indebtedness. On the 24th of April, 1885, J. S. purchased the goods in the store, and in payment discharged the mortgages, and assumed the indebtedness for which he was liable as endorser, and paid T. \$1,500 in cash. The statement of T. was false, and his entire property and assets at the

time was no greater than the amount of his liabilities. The justice gave judgment for defendant.

M. T. Powell, for applt.

H. M. Field, for respt.

Held, That as the verdict was for defendant, it must be assumed that the justice failed to find a fraudulent intention on the part of T. in making the misrepresentations as to his financial condition; and the conclusion of the magistrate, that there was no fraud in the transaction, is conclusive upon plaintiff.

Assuming that a case might be supposed, in which the evidence of fraud would be so clear and conclusive that the court might set aside a verdict of a jury, or the findings of a justice, as against the weight of evidence on the question of fraudulent intent, yet this is not such a case. The question of fraudulent intent in cases of this character is one of fact, and is generally deducible from a series of other facts and circumstances connected with the transaction, which ordinarily indicate an intention on the part of the purchaser to cheat and defraud the seller out of his property. 63 N. Y., 427; 45 id., 169, 175. The question of fraud is always one of fact and not of law. To establish fraudulent intent in a particular instance the integrity of the accused party must be attacked and broken down, and it must be shown that a deceitful purpose actuated him in making the agreement. There are some circumstances in this case which might lead the

justice to the conclusion that T., although he misstated his financial condition, had no intention of cheating plaintiff. The amount of goods purchased was small, and if they had been received before he sold out his stock of goods to J. S., they would not have largely added to their value. The evidence fairly tends to establish that if all the property which he had on hand at the time he made the purchase had been prudently and carefully managed it could have been converted into money sufficient to have paid his indebtedness in full. While the justice may well have found that T., at the time he closed out his business conveyed all his property to J. S. with intent to cheat and defraud plaintiff, it does not necessarily follow that he had formed such a purpose at the time he purchased the goods. As bearing upon defendant's position, that T. had no intent to deceive plaintiff as to his financial condition, there is the circumstance, of much significance, that he introduced plaintiff's agent to his principal debtor, from whom the agent could have readily ascertained T.'s true financial condition. If T. was solvent at the time of the purchase of the goods, as the evidence tends to show, then the magistrate's conclusion, that the same was made without any fraudulent purpose, is sustained by a very significant circumstance.

Order affirmed.

Opinion by *Barker, J.; Smith, P.J., Haight and Bradley, JJ.*, concur.

WHARFAGE. BILL OF LADING.

N. Y. COURT OF APPEALS.

Woodruff et al., *respts.*, v. Havemeyer et al., *appls.*

Decided June 7, 1887.

A bill of lading provided that the steamer had the option of discharging at New York or Brooklyn, consignees to pay charges as expressed in the margin. It refused to deliver to defendants in New York, but discharged on plaintiffs' wharf in Brooklyn. *Held*, That under the contract it had a right to do so, and that plaintiffs could recover the rates specified in the margin of the bill of lading.

Chap 830, Laws of 1872, does not prohibit the owner of a private wharf from entering into a contract for the landing and deposit of goods on his wharf on such terms as may be agreed on with the owner of the goods.

Action to recover certain landing and wharfingers' fees at a rate expressed in the margin of the bill of lading under which the goods on account of which the fees are charged were shipped. The vessel carrying the goods carried a general cargo. The bill of lading provided that the goods should be at the owner's risk "as soon as delivered from the tackles of the steamer, in the aforesaid port of New York (steamer has option of discharging cargo at New York or Brooklyn, consignees of cargo to pay charges thereon as expressed in the margin)." The vessel on reaching New York stopped at the regular pier of the company there and discharged its light cargo, and the sugars belonging to defendants with other sugars and goods were taken to plaintiffs' wharves in Brooklyn,

where they were discharged. This was done under the option contained in the bill of lading and because it was more convenient for the steamer to sort out defendants' sugars. Defendants were ready on the arrival of the steamer in New York to receive the sugars in lighters and requested that they be so delivered.

John E. Parsons, for appits.

S. C. Nash, for respts.

Held, That under the contract the steamer had a right to deliver the sugars upon the wharf in Brooklyn; that the receipt of the sugars on the wharf was in legal effect a service rendered by plaintiffs for defendants, upon the employment of the carriers duly authorized to contract in behalf of defendants for the service at the rates agreed upon in the bill of lading; and plaintiffs having received the goods under the terms expressed therein, thereby became entitled to enforce the contract made for the benefit of such wharfing as should render the contemplated service.

In general a bill of lading is binding upon and protects all persons who by the means of or under it become the custodians of the goods. 87 N. Y., 413; 41 id., 16; 14 Wall., 579.

The provisions of Chap. 320, Laws of 1872, entitled "An act to amend an act in relation to the rates of wharfage, and to regulate piers, wharves, bulkheads and slips in the cities of New York and Brooklyn," etc., cannot be construed to prohibit the owner of a private wharf from entering into

a contract for the landing and deposit of goods upon his wharf upon such terms as may be agreed upon between himself and the owner of the goods, nor can it be construed as requiring him to store goods for any period of time without compensation. The intention of the legislature to exercise such an exceptional power cannot be inferred from the language of the act of 1872. 42 N. Y., 384.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by *Andrews, J.* All concur.

VILLAGES. ORDINANCES.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The Village of Niagara Falls, *respt.*, v. John Salt, *applt.*

Decided June, 1887.

In pursuance of a power given by the charter "to restrain and prohibit all runners, solicitors or guides for boats, carriages, railroads, public houses, etc.," the village trustees passed a by-law or ordinance, providing "that all persons are prohibited within the corporate limits of this village, from running for or soliciting any passengers or persons, for any public or private conveyance, or for any tavern, boarding house, etc.," under a penalty. *Held*, That the by-law was applicable to such solicitations made upon one's own land to persons passing along the street, as well as to solicitations made within the limits of the street itself, and such a by-law was reasonable and valid in law.

Appeal from judgment of County Court affirming judgment of police justice.

Action to recover a penalty for violation of a village by-law.

Defendant was one of the lessees and proprietors of an hotel in Niagara Falls, fronting on the same side of the street as the N. Y. Central R.R. depot. Large numbers of passengers emerging from the depot pass down the same side of the street to the river and other points of attraction, and in doing so pass defendant's hotel. The hotel stands nine feet from the line of the street, with a stoop or veranda about seven feet in width running to within two feet of the street line. In front of the stoop are planks nailed crosswise over the planks of the sidewalk which occupy the remaining two feet of the premises. Defendant and his son ran the house as an inn or tavern, and kept conveyances for hire.

On the 30th of May, 1886, at 8 o'clock, A. M., just after the arrival of a train at the depot, defendant, while standing upon that portion of the premises marked by the planks, accosted four persons who were passing along the sidewalk, saying: "Breakfast is all ready, gentlemen. If everything is not satisfactory your money is refunded." The party first halted and then passed on, one of them saying he had breakfast. Defendant, standing on the same planks, again accosted them, saying: "Would you like a carriage to go around and see the sights?" The party kept on down the street without responding.

The trustees of the village are authorized to pass by-laws, "To

restrain and prohibit all runners, solicitors or guides for boats, carriages, railroads, public houses, places of resort, or for any other place or purpose whatsoever." They passed a by-law "that all persons are prohibited within the corporate limits of this village from running for, or soliciting any passengers or persons, for any steamboat, or other public or private conveyance, or for any tavern, boarding house, store or other place of resort, under penalty," etc. Defendant was charged with violating this by-law, and was fined.

F. Brundage, for applt.

W. Caryl Ely, for respnt.

Held, That the by-law was applicable to solicitations made upon one's own land to persons passing along the street, as well as to solicitations made within the limits of the street itself; and that such by-law was valid.

The power to restrain and prohibit runners, solicitors, etc., is not limited to the public places or streets of the village, but the power is given to restrain them wherever they may be within the corporate limits. Had it been the intention of the legislature, or of the trustees, to limit solicitations for passengers and patronage to the public streets, such limitation would doubtless have appeared by express terms in the provision of the charter and by-law.

Nor do we think the ordinance in question is a violation of any common law right, for no person has the right to so conduct himself or use his property as to annoy and vex others when passing

along the public way. It may be just as much annoyance to travelers to be accosted by a person standing a few inches from the sidewalk over which they are passing, as it would to be accosted by a person standing in the middle of the street.

In *City of Rochester v. Close*, 35 Hun, 208, the charter did not authorize the ordinance, and for that reason the ordinance could not be enforced.

Judgment affirmed.

Opinion by *Haight, J.; Smith, P.J.*, and *Bradley, J.*, concur.

CORPORATIONS. FORECLOSURE.

N. Y. COURT OF APPEALS.

Herring, applt., v. *The N. Y., L. E. & W. RR. Co. et al.*, *respts.*

Decided April 19, 1887.

Pending an action to dissolve a corporation an action was commenced to foreclose a mortgage given by it, in which action it was decided that certain property not in terms covered by the mortgage was in fact covered by it. *Held*, That all the parties to that action were bound by the judgment and that it could not be impeached in a collateral action by the corporation or its general creditors; that the unsecured creditors were not proper parties to such action, or entitled to notice until the appointment of a final receiver; nor even then except as to their rights in such property as comes to the receiver to be distributed by him.

The rule that a receiver's title relates back to the commencement of the action does not apply to a case where property has been legally disposed of under the direction of the court.

The confession of judgment prohibited by § 71 of 2 R. S., 469, is a voluntary one made without the interference of the court.

This action was brought by plaintiff on behalf of himself and other creditors of the Erie R. Co. who are similarly situated to reach certain stock and bonds which belonged to said Erie R. Co. and which plaintiff claimed were not subject to or covered by certain mortgages of the Erie R. Co. which had been foreclosed. It appeared that in 1875 an action was commenced by the People to dissolve said corporation and a temporary receiver was appointed under the provisions of the Revised Statutes. An order was made in said action by the court which permitted the holders of certain mortgages upon the railroad franchises and other property of said corporation to foreclose them. An action to foreclose was brought and the receiver in the People's action was appointed temporary receiver in the foreclosure action. An order was made therein, on due notice, which directed the receiver to hold and deal with certain stocks and bonds belonging to the corporation, not in terms covered by the mortgages, as a part of the general fund embraced in the mortgages. The said stock and bonds were by the judgment held to be subject to the mortgages and that they should be sold with the mortgaged premises. They were sold and the sale was confirmed by the court. After the report of sale in the foreclosure suit was confirmed an order was made directing the receiver to transfer all the property sold to a new corporation, the assignee of the purchasers, subject

to the right of the People as ascertained in the action brought by them.

Thereafter a supplementary pleading was served in the People's action, which alleged that said stocks and bonds were unlawfully included in the foreclosure sale. A referee was appointed to examine the matter, upon whose report a judgment was rendered which held that said stocks and bonds were covered by the mortgages and that the purchasers of them had a good and valid title. No notice of the hearing before the referee was given to the unsecured creditors. The judgment dissolved the corporation and appointed the temporary receiver final receiver.

J. Alfred Davenport, for applt.

George W. Comstock and William W. McFarland, for respts.

Held, That the Supreme Court had general jurisdiction of the parties and the subject matter, and it was to be presumed that the facts before it authorized the adjudications made; that all the parties to the foreclosure action were absolutely bound by the judgment therein, and the adjudications of the court could not be impeached in a collateral action by the corporation or any of its general creditors; that the unsecured creditors were not necessary or proper parties to the foreclosure action and had no right to intervene therein; neither was the temporary receiver appointed in the action brought by the People, nor the People a necessary party to the foreclosure suit, but the court could in its discretion allow the People or the re-

ceiver to intervene in said action.

The action brought by the People was commenced under the Revised Statutes and before the passage of the Code of Civil Procedure.

Held, That the temporary receiver was not vested with title to the property of the corporation, but such title remained in the corporation until its dissolution was finally adjudicated and a final receiver appointed; that the temporary receiver was a mere custodian or manager of the property subject to the orders of the court while the action was pending, and was not a trustee of the creditors of the corporation.

Also held, That until the appointment of the final receiver, the unsecured creditors of the corporation were not entitled to notice, they being represented by the People and the corporation.

Also held, That the court was not required to defer the litigation as to the stocks and bonds until after a final receiver had been appointed, but was authorized to allow it to proceed to a conclusion before final judgment.

Also held, That upon the appointment of a statutory final receiver of an insolvent corporation the creditors are not entitled to a notice or hearing except as to claims upon and their rights in such property as comes to the receiver be administered upon and distributed by him to the creditors.

It was claimed by plaintiff that the receiver's title related back to the commencement of the People's action and therefore overrode the disposition of the stocks and bonds.

Held, Untenable, that the equitable rule which gives a receiver title to the debtor's property by relation as of the commencement of the action is one adopted to defeat fraudulent, unwarranted and unjust dispositions of the debtor's property and to accomplish just and equitable ends, but it is not applicable to a case where a property had been legally disposed of under the direction of the court.

After the foreclosure suit was commenced the railroad company consented to enter a judgment therein. It was claimed that this amounted to a judgment by confession under § 71, 2 R. S., 469, which makes judgments confessed by a corporation, after a petition for its dissolution has been filed, void as against a receiver appointed on the petition and as against the creditors of the corporation.

Held, That the confession so prohibited is a voluntary one, made without the interference of the court.

The two systems of procedure against corporations provided for by the Revised Statutes have been continued since the enactment of the Codes, and under the Code of Civ. Pro. for the first time there is a provision regulating the powers and duties of receivers appointed in equitable actions.

Judgment of General Term, affirming judgment sustaining demurrer to complaint, affirmed.

Opinion by *Earl, J.* All concur, except *Finch* and *Peckham, JJ.*, dissenting.

REFERENCE. COSTS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Alvin Martin, *respt.*, v. James Hodges et al., *appls.*

Decided June, 1887.

The provisions of Rule 30 in respect to the filing of the report of a referee, giving notice thereof and filing exceptions thereto, has no application to a reference ordered by the court for the purpose of enabling it to determine questions involved in a motion pending before it. *So held*, Where, upon a motion to open a default, the affidavits being contradictory as to when the complaint was served, a reference was ordered to take proofs, and upon the coming in of the report the same was confirmed and an order made allowing defendant to answer upon terms.

In such case, the hearing upon the referee's report was but a continuation of the original motion, and the court had no power to allow costs as for two motions.

Appeal from order of Special Term confirming report of a referee, and granting leave to answer upon terms.

Defendant moved to open judgment entered upon an alleged default and for leave to answer. Defendants claimed that the complaint was served on the 10th of July, and that the answer was served on the twentieth day thereafter; whilst plaintiff claimed that the complaint was served on the 9th of July. The affidavits being contradictory the court referred the matter to a referee to take proof as to the time when the complaint was served and to report to the court. The referee accordingly took proofs and reported the same to the court, together with his opinion that the complaint was

served on the 9th of July. The court thereupon confirmed the report and made an order allowing defendants to answer upon payment of \$20 motion costs and \$12 disbursements.

It is contended that the report not having been filed in the clerk's office in accordance with Rule 30, the court had no power to confirm it.

N. H. Hill, for appls.

Wiltsie & Lewis, for respt.

HAIGHT, J.—The matter referred in the case under consideration was pending before the Special Term, and the reference ordered was merely to aid the court in determining the questions involved in the motion. The evidence was returned with the report. The report of the referee was in nowise binding upon the court, for it had the power to disregard it and draw its own conclusions from the evidence. 51 N. Y., 140. The report, if filed with the clerk under the provisions of the rule, would stand confirmed if no exceptions were filed after the expiration of eight days. But this would not determine the motion, for it would still be pending before the Special Term, and the court, as we have stated, would not be bound by the report. For this reason we conclude that the rule has no application to references made for the purpose of aiding the conscience of the court in determining questions pending before it, where a referee is to report the evidence, together with his opinion thereon,—it has reference

to the cases where an order of reference is made under some provision of the statute, in which the questions referred are to be determined by the referee. It is contended on the part of the appellants, that unless exceptions are filed to the report, they have no opportunity to review the same. This is not the case, for an opportunity is given when the evidence and report are brought before the Special Term, and again by appeal from the order made by the Special Term thereon.

The charging of the defendants \$32 costs as a condition of answering, for a mistake of a single day, doubtless honestly made, is somewhat of a hardship. It is not the usual practice to order a reference in such a case, and we think the practice should not be followed except in extraordinary cases, where the court is unable to determine the facts from the papers read upon the motion. In this case there was but one motion and that was to vacate the judgment, open the default and permit the defendants to answer. On the first hearing this motion was not disposed of, but was postponed until the coming in of the referee's report. The hearing upon the return of the referee's report was but a continuation of the same motion, and we are of opinion that the court had no power to allow costs as for two motions.

Order modified by deducting \$10 costs, and the appellants to have ten days in which to comply with the conditions of that order, etc.

Smith, P.J., and *Bradley, J.*, concur.

EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Emma C. Gaige, *respt.*, v. The Grand Lodge Ancient Order of United Workmen, *applt.*

Decided June, 1887.

In an action against a beneficiary organization to recover a death benefit, it appeared that the deceased had been suspended, but it was claimed that a resolution of the lodge had been passed reinstating him. To prove this, an officer of the lodge testified that a letter shown him was a copy of one he had written to the grand recorder. The letter was received in evidence, against objection, and there was no other evidence that such resolution had been passed except the statement contained in this letter. *Held*, That as it did not appear that the original letter was lost or destroyed, nor that any notice was served upon defendant to produce it, etc., the copy was inadmissible as evidence.

Appeal from judgment entered upon decision of the court on a trial without a jury.

Action upon a beneficiary certificate issued to plaintiff's husband, and payable to her upon his death.

Under the charter of the grand lodge a member suspended for nonpayment of assessments could only be restored to membership by making an application in writing, signed by himself, for such restoration, and the same had to be presented at a regular meeting of the subordinate lodge accompanied with the amount due; and thereupon, if the lodge saw fit by a majority vote, he could be restored. Plaintiff claimed that this requirement was waived by a resolution passed by the subordinate

lodge, providing for the re-instatement of members then in default upon payment of dues, etc., in arrear; in pursuance of which Gaige's father paid said arrears to the financier of Gaige's lodge the day before his death. To prove the passage of such resolution Shelley, the financier of said lodge, was sworn as a witness and testified that he wrote a letter to Horton, the grand recorder of the lodge, three days after Gaige's death, explaining his suspension, stating the passage of said resolution, and the payment and receipt of the dues, etc., in arrear. He was then shown a letter and asked whether it was a true copy of the one he referred to; and he answered in the affirmative. The letter was then put in evidence, against defendant's objection. He was then asked, "Did the lodge at a regular meeting pass the resolution referred to in this letter?"

Objected to as incompetent and improper, and not the best evidence. Overruled and exception taken. Witness answered, "I think this was the first meeting, Sept. 5, 1885, after they were suspended."

Leroy Andrus, for *applt.*

C. D. Knapp, for *respt.*

Held, That as it did not appear that the original letter was lost or destroyed, nor that any notice was served upon defendant to produce it, or any other foundation laid for the introduction of secondary evidence, the copy was inadmissible.

Again, there is no evidence

showing that this resolution was in fact passed, except as the statement of it appears in this letter. The minutes of the meeting were not produced or read in evidence. And the answer given by the witness falls far short of showing that there was in fact such a resolution passed.

Plaintiff sought to show that the money paid to the financier of the subordinate lodge was paid over to the grand receiver of defendant and retained by him, and for this purpose offered in evidence a receipt purporting to be signed by the grand receiver, and counter-signed by the grand recorder. Objected to upon the ground that no proper foundation had been laid for the proof. Overruled and exception.

Held, That as there was no proof or admission as to the genuineness of the signatures, the receipt was inadmissible.

Judgment reversed and new trial ordered.

Opinion by *Haight, J.; Smith, P.J.*, and *Bradley, J.*, concur.

EJECTMENT. PARTIES.

N. Y. COURT OF APPEALS.

Sisson et al., respts., v. Cummings et al., appls.

Decided June 7, 1887.

Certain lands were conveyed to one C. reserving the rights of the grantor to land under water. C. thereafter died leaving a husband and children. Neither C. nor her children had entered upon or claimed the reserved portion, but it appeared that the husband had. *Held*, That the children were not bound by the acts of their

father and the joinder of them as parties in an action of ejectment was not justified by § 1508.

This was an action of ejectment. The premises in question were conveyed to C., a married woman, Nov., 10, 1871, subject to a reservation "of all his (the grantor's) rights to the land now under water beyond or southwest" of the southwest line of the lot conveyed.

C. entered into possession under the deed and occupied the house and lot upon it with her husband and children until her death, Jan. 31, 1875, when the title descended to her two children, who are infants and were made parties defendants therein, subject to the life estate of her husband, who was also made a defendant. The premises in question are those embraced in the reservation. It did not appear that C. had ever entered upon them or that C. or her infant children had ever claimed any right or interest in them, and the answer of the latter expressly avers that they had no interest in any lands except those of which their mother was seized at the time of her death, and they insist that this action cannot be maintained against them. There was enough proved to entitle plaintiffs to maintain an action of ejectment against the husband of C.

Wayland F. Ford, for appls.

Denis O'Brien, for respts.

Held, That the infant defendants are not bound by the acts of their father, and the joinder of them as defendants is not justified by § 1503 of the Code of Civil Procedure, which authorizes any

person claiming title to or the right to possession of real property sought to be recovered in an action, as landlord, remainderman, or reversioner or otherwise adversely to the plaintiff, to be joined as defendant.

Judgment of General Term, affirming judgment for plaintiff, reversed as to infant defendants, and new trial ordered.

Opinion by *Andrews, J.* All concur.

LARCENY. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The People, *respts.*, v. Henry G. Luke, *applt.*

Decided June, 1887.

Upon an indictment for larceny in obtaining goods by means of a false representation or pretense, evidence of other similar transactions at or about the same time is competent, as bearing upon the question of intent. Letters written by the prisoner to other dealers, and their replies thereto, and the procuring of the goods by means thereof, are admissible for such purpose; but letters written long after the transaction has taken place are not admissible for any purpose.

A letter written by the prosecutor to the prisoner some time after the obtaining of the goods charged in the indictment, and accusing him of bad faith and of avoiding payment, is not admissible; it is merely the written declarations of the prosecutor, and is no part of the *res gestae*.

A letter written by another dealer to the prisoner, about a year previous to the commission of the offense charged, accusing him of having swindled the writer out of the price of potatoes, etc., is no part of the *res gestae*, and is no evidence to show that defendant ordered the potatoes, that the order had been filled, and the price not paid.

Appeal from judgment of conviction of grand larceny in the second degree and from order denying new trial.

Defendant was engaged with one Silas W. Milliman in the grocery business in Rochester; the business was carried on in the name of S. Milliman, defendant having a power of attorney from Milliman to carry on the business in his name, to sign his name to all drafts, checks, etc., and whatever else was necessary in the conduct of their business. In the same city there was a man engaged in the same business by the name of Samuel Millman, who was a man of wealth and reputation, doing a large business throughout the country, and was rated in a commercial agency as being worth \$50,000. August 15, 1885, defendant addressed a letter to J. B. Clement & Co., Philadelphia, having a printed heading of "S. Milliman, dealer in foreign and domestic fruits, vegetables, etc., 224 North Clinton street, Rochester, N. Y. Consignments solicited;" in which he asked the prices of certain fruits and vegetables, and signed it "S. Milliman, per L." Subsequently an order for ten barrels of sweet potatoes was received by Clement & Co. from these parties, which was filled and the price paid. On Sept. 1, 1885, a further order was received, signed "S. Milliman," for fifty barrels, and subsequently other orders were made in the name of S. Milliman, all of which were filled and the goods shipped, none of which were paid for.

The evidence showed that defendant wrote the letters, signed Milliman's name, and generally took charge of the business.

The prosecution claimed that defendant made use of Milliman's name for the purpose of deceiving dealers throughout the country, and for that purpose he dropped the given name "Silas W." using only the letter "S.," so that the name might be easily taken for "Samuel" or "S. Millman." That this was a scheme to induce dealers living at a distance to consign produce to him or S. Milliman, on credit. That at the time of procuring the property mentioned in the indictment both defendant and Milliman were insolvent and had no intention of paying for the same, and that it was procured with the intent to cheat and defraud Clement & Co.; and for the purpose of establishing this fraudulent intent the prosecution introduced in evidence a large number of letters to other dealers living at a distance throughout the country, of the same import as those addressed to Clement & Co.

The prosecution produced a letter which was shown to the witness Spears, who had been at work for these parties in their store, and who testified that the letter had been received by Milliman or Luke. The letter was dated Philadelphia, Oct. 3, 1885, addressed to "S. Milliman," and signed by Clement & Co., in which they alluded to a visit to Rochester, and that he shunned them and kept out of the way so as to avoid paying for the goods

ordered, etc. The letter was objected to, as being nothing but declarations of Clement after the transaction had been closed. Overruled and exception taken.

Patrick McIntyre, for applt.

Geo. Benton, dist. atty., for the People.

Held, That the letter was improperly admitted.

Undoubtedly evidence of other similar transactions at or about the same time is competent, as bearing upon the question of the intent of the person charged with a criminal act. The letters written to these dealers and their replies thereto, when properly identified, and the fact as to whether the goods were procured, was doubtless competent upon this branch of the case as bearing upon the question of intent, but letters written by dealers long after the transaction has taken place are not competent evidence for any purpose. The letter was not even identified as having been written and sent by Clement & Co. to defendant, or Milliman. If it was written by Clement & Co., as it purports to be, and forwarded to Milliman, it was long after the transaction charged in the indictment, and consequently no part of the *res gestae*; it does not appear to be more than the declarations of Clement after the transaction, and such declarations are not evidence against a person charged with crime.

Witness Spears testified that he believed Milliman did business with J. Bland, of Baltimore, in the fall of 1884. He was then

shown a letter, and answered that it was received from Bland. The letter was dated Baltimore, Oct. 9, 1884, and addressed to S. Milliman, accusing him of having swindled the sender out of the price of potatoes, etc. Received under objection.

Held, That the letter was no part of the *res gestae*, and it was not competent to prove by it an order from defendant in the name of Milliman for potatoes or other produce, and that such order had been filled and not paid for.

Conviction reversed and new trial granted.

Opinion by *Haight, J.; Smith, P.J.*, and *Bradley, J.*, concur.

MARRIED WOMEN. NEGOTIABLE PAPER.

N. Y. COURT OF APPEALS.

Noel et al., *appls.*, v. Kinney, *impl'd.*, *respt.*

Decided June 7, 1887.

Where property has been purchased for a married woman and she has received the benefit thereof she is liable on a note given therefor signed by her husband in a firm name under which he and she transacted business as to her property, without regard to the question whether she could form a partnership with her husband.

This was an action upon a promissory note. It appeared that defendant was a married woman and owned improved real estate; that she with her husband for convenience transacted business in relation to her property under the name of J. P. K. & Co.; that the note in suit was given by the husband, who signed it J. P. K. &

Co., for the purchase price of mirrors which were placed in houses belonging to the wife, under whose authority they were bought and by whom they were retained. The wife set up coverture as a defense.

Nicholson P. O'Brien, for *appls.*

G. Storms Carpenter, for *respt.*

Held, That the wife having received the benefit of the mirrors purchased, and they having been purchased for her, she is liable upon the note without regard to the question whether she could form a partnership with her husband. 53 N. Y., 422; 61 *id.*, 512; 53 *id.*, 93.

Judgment of General Term, overruling plaintiff's exception and dismissing complaint, reversed, and judgment ordered on verdict for plaintiff.

Opinion by *Danforth, J.* All concur.

MORTGAGE. LEASE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Philip F. Kribbs, *respt.*, v. Byron Alford et al., *appls.*

Decided June, 1887.

G. & P. were the assignees of an oil lease, which required a certain number of wells to be drilled within specified times, but the lessor afterward extended the time and they agreed to put down additional wells. P. executed a mortgage to plaintiff upon his individual interest in the leasehold premises, together with all his interest in oil wells, machinery, structures, fixtures, etc., thereon, or thereafter to be placed thereon; and covenanted that he would perform all the conditions and requirements of the lease; which mortgage was duly filed. Afterward, G. & P. assigned all their rights under

the lease to defendants, who entered into possession and put down the wells required by the lease. *Held*, That the mortgage became a lien upon the wells, fixtures and appliances put upon the premises by defendants in accordance with the requirements of the lease.

Appeal from judgment of foreclosure and sale entered upon the report of a referee.

Johnson, the owner of certain premises, leased to A. for the period of twelve years the exclusive right to produce oil and gas from the same. A. assigned his interest in the lease to G. & P. P. executed a mortgage to plaintiff upon his undivided interest in the leasehold premises, together with all his interest in the oil wells, machinery, structures, fixtures, etc., thereon, or thereafter to be placed thereon. This mortgage was duly filed and re-filed. G. & P. afterward assigned all their rights under the lease to defendants. The lease required a certain number of wells to be drilled within certain fixed times. When the lease was assigned to G. & P., Johnson, the lessor, extended the time for drilling the wells, and they, in turn, agreed to put down other wells within the time designated. The question was whether the mortgage became a lien upon the wells, fixtures, boilers and machinery that were subsequently put upon the leasehold premises by defendants.

J. H. Waring, for applts.

C. D. Dwinelle and *J. Arthur Corbin*, for resp't.

Held, That the lien of the mortgage extended to the wells, fix-

tures and appliances put upon the premises by defendants, in accordance with the requirements of the lease, after the making and delivery of the mortgage.

P. in his mortgage covenanted that he would perform each and every condition and requirement of the lease, according to its true tenor and spirit. In other words, he agreed with plaintiff to go on and put down the wells required by the lease and the agreement with the lessor extending the time, and to give plaintiff a lien, by this mortgage, upon such wells, structures, fixtures, etc. Defendants, after taking assignment of lease from G. & P., entered into possession and performed its conditions by putting down the wells therein called for. In doing so they but carried out the covenant of P. embraced in his mortgage to plaintiff. But they contend that they did not know of this mortgage. They went to the town clerk's office and made a search but could not discover it. But the mortgage was there on file, and their failure to discover it was no fault of plaintiff. They are consequently chargeable with constructive notice, and the lien of the mortgage is not affected by their failure to find it.

Appellants contend that there had been a forfeiture of the lease by G. & P. before assignment to defendants.

Held, That as the lessor had not claimed a forfeiture, but waived it by extending the time for performance, appellants could not take advantage of a breach of

the conditions and insist upon a forfeiture.

Judgment affirmed.

Opinion by *Haight, J.; Smith, P.J., and Bradley, J., concur.*

RAILROADS. MASTER AND SERVANT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Charles H. Dwinelle, *applt.*, v. The N. Y. C. & H. R. RR. Co., *respt.*

Decided June 18, 1887.

When a sleeping car porter is not engaged about the transportation of passengers and not on the train by which the passenger is to be transported or connected therewith the relation of master and servant does not exist between him and the railroad company, and the latter is not liable for his acts.

Appeal from judgment entered on dismissal of complaint.

Action to recover for injuries caused by an assault by a sleeping car porter. Plaintiff entered a sleeping car attached to one of defendant's trains at Geneva and bought a ticket to New York from the porter in charge. The train, instead of reaching New York in the morning, was at that time switched on a side track near Utica by reason of a washout. Plaintiff was informed that passengers would be transferred by a temporary train. The porter delivered up the passage ticket and carried plaintiff's luggage to the other train, as the sleeping car was going no further. As the porter was leaving plaintiff demanded the sleeping car ticket and the

porter replied that he had to show it to the company. He walked some distance with him and showed him the sleeping car conductor that was going with them, but refused to tell the conductor that plaintiff had a right to a section to New York, and was again leaving, when plaintiff said "You must not leave me without giving me some satisfaction in this business." The porter turned and said "Take your hand off me or I'll hit you," and then struck plaintiff.

Defendant moved for a nonsuit on the grounds that no cause of action against defendant was made out; that the act complained of was not within the scope of the authority of the person who did the act, and that it was not done by any servant of defendant while engaged in performing any duty which defendant owed plaintiff. The motion was granted.

Hugh Cole, for *applt.*

Frank Loomis, for *respt.*

Held, No error. That the porter was not to be deemed a servant of defendant. It is undoubtedly true that defendant's servants were bound to exercise due care, even though plaintiff was not actually on one of its cars, to protect him from assault, but as the act was not one to be foreseen, and consequently could not be guarded against, there is no evidence of want of care in that respect, and plaintiff must recover, if at all, upon the ground that the assault was committed by one of defendant's servants while engaged in the business of defendant. It

might be true, that under the rule laid down in 76 N. Y., 402, if the assault in question had been committed upon plaintiff while upon the train that the railroad company would have been liable, although the dispute was about sleeping car accommodation which, under the law of 1858, might legally be furnished by another party; but it would be enlarging the rule that the porters on these cars are constructively the servants of the railroad company to an unnecessary extent to hold that when porters of these cars are in nowise engaged about the transportation of the passengers, and are not on the train and have no connection therewith the relation of master and servant exists even constructively between such porter and the railroad company.

In the case at bar the porter was in nowise engaged in the business of the transportation of plaintiff. Plaintiff had been transferred to another train, with which the porter had no connection. He had given up the passage ticket to plaintiff, had transferred his small luggage to the other train, and had gone a considerable distance from the train, followed or accompanied by plaintiff without any invitation of his, plaintiff following him for the purpose of securing sleeping accommodation on the other side of the washout, with the furnishing of which defendant had nothing to do. If defendant furnished transportation that was all it was required to do by its contract; and if, in his anxiety to

secure something beyond that to which he may have been entitled from somebody else plaintiff met with an obstruction from which he suffered damage defendant cannot be held liable therefor.

Judgment affirmed, with costs.

Opinion by *Van Brunt, P.J.*; *Daniels and Bartlett, JJ.*, concur.

CORPORATIONS. TRUSTEES.

N. Y. COURT OF APPEALS.

Whitaker, applt., v. Masterton et al., respts.

Decided June 28, 1887.

In the annual report of the trustees of a manufacturing corporation the amount of capital paid in cash is not required to be separately stated.

Affirming S. C., 21 W. Dig., 209.

This action was brought to recover a balance unpaid on certain promissory notes against the trustees of a corporation organized under the General Manufacturing Act, Laws of 1848, Chap. 40, to enforce their liability as such arising out of their failure to publish and file an annual report as required by § 14 of said act. It appeared that the report objected to stated the amount of the capital to be \$50,000, "amount of the capital paid in \$50,000, all of which has been paid in cash, patent rights, merchandise, machinery, accounts, etc., necessary to the business, and for which stock to the amount of the value thereof has been issued by the company. Amount of the existing debts of the company do not exceed \$38,500." This report did not

state the proportion of the capital paid in cash.

George V. N. Baldwin, for applt.

Flamen B. Candler, for respts.

Held, That the report was in form in full compliance with all the section required, therefore no penalty was incurred, as no statement of the proportion paid in cash was required. The section in question being highly penal its scope should not be enlarged by construction or implication. 63 N. Y., 62; 64 id., 173; 80 id., 138; 103 id., 425.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Earl, J.* All concur.

CONTRACT. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

James C. Stout, *respt.*, v. *Thomas Jones*, *applt.*

Decided June, 1887.

Where the provision of a building contract requiring the work to be completed within a specified time has been waived by the owner he is not entitled to recover damages by reason of the non-completion of the building within the time specified. Evidence as to whether work on a building contract was delayed by putting it off till spring is incompetent, as the fact could be determined without the aid of the opinion of experts.

A requirement of the contract that orders for extra work and material shall be in writing and signed by the parties may be waived by their acts.

Appeal from judgment entered upon report of referee.

Action to recover a balance due on a building contract and also a sum for extra work and material.

The contract was made Nov. 9, 1882, by which plaintiff was to remove an old building and erect a new one upon the site thereof; the work to be completed June 15, 1883, and in default thereof plaintiff agreed to pay \$10 per diem for every day thereafter. Work was immediately commenced and continued until Nov. 25, when defendant told plaintiff that he concluded not to have the old building taken down until spring, as they wanted it to use during the winter; plaintiff replied that in such case he could not complete the work by June 1; defendant repeated his desire and said he would let him know in the spring when to commence work upon it. Thereupon plaintiff discharged his men employed for the purpose of removing the building. March 24, 1883, plaintiff was notified to commence tearing down the old building, which he did at once. At this time the ground was frozen, and considerable delay was caused in digging the cellar; heavy rains came on, filling the excavation with water, which delayed the completion of the cellar for about one month. The building was completed Dec. 25, and turned over to defendant.

The referee found that the failure to complete the work within the agreed time was caused by defendant's act in preventing plaintiff from taking down the old building, thus delaying and retarding the progress of the work upon the new. Defendant claimed the damages fixed for not completing June 1, and argued that plain-

tiff was not retarded in his work to the extent of one hundred and ninety three days: that in the winter season he could not work with the same advantage as he could in summer. Whilst plaintiff contends that the old building could have been removed in Nov., the cellar completed and the walls put up, and thus the delay occasioned by the spring rains could have been avoided.

Payne & O'Brien, for applt.

Woodin & Warren, for respt.

HAIGHT, J.—We do not think it necessary to speculate upon these claims, for the question for our determination is whether or not defendant has waived the provision of the contract requiring the new building to be constructed on or before June 15. Upon this question defendant himself concedes that he gave plaintiff until Sept 1, or until his return from Europe, which was shortly thereafter. Plaintiff, on the other hand, claims that there was no limit to the time fixed in which the buildings should be completed, after the arrangement was made to postpone the taking down of the old building until the next spring. Upon this conflict of evidence the referee has found for plaintiff, and we cannot say, on review, that such finding is against the weight of evidence. If this provision of the contract was waived defendant is not entitled to recover damages by reason of the non-completion of the building within the time specified. 89 N. Y., 566; 36 id., 388; 102 id., 205.

A witness for plaintiff testified as to time of commencing tearing down the old building, the delays occasioned by the frost and rains while engaged in excavating for a cellar. Upon cross-examination he was asked: "In your opinion did it delay the work by putting it off till spring?" Objected to and excluded.

Held, Incompetent, as the fact could be determined without the aid of the opinion of experts.

The order for extra work and material was not in writing and signed by the parties, as required by the contract.

Held, Immaterial, as the requirement was waived by the acts and conduct of the parties. 102 N. Y., 87; 93 id., 576.

Judgment affirmed.

Smith, P.J., and *Bradley, J.*, concur.

ADULTERATED MILK. EVIDENCE.

N. Y. COURT OF APPEALS.

The People, *respts.*, v. Kibler, *applt.*

Decided July 1, 1887.

In a prosecution under Chap. 183, Laws of 1885, for selling adulterated milk evidence of an absence of criminal intent is inadmissible; the act alone, irrespective of its motive, constitutes the crime.

Defendant was convicted for selling adulterated milk, under Chap. 183, Laws of 1885, as amended by Chap. 458, Laws of 1885. Section 1 provides that "no person or persons shall sell or exchange, or expose for sale or exchange, any unclean, impure, unhealthful,

adulterated or unwholesome milk." It was proved that defendant had sold milk falling below the standard fixed by the act. Defendant offered to show an absence of criminal intent, but the offer was rejected.

Giles Stilwell, for applt.

George T. Quinby, for respts.

Held, No error; that knowledge or intention forms no element of the offense. The act alone, irrespective of its motive, constitutes the crime. 101 N. Y., 634; 37 Hun, 323.

An exception was taken to a portion of the charge of the court, construing the provision of the statute relating to skimmed milk.

Held, That this exception was not available, as that question was not in the case.

Order of General Term, affirming judgment on verdict convicting defendant, affirmed.

Opinion by *Finch, J.* All concur, except *Rapallo, J.*, not voting, and *Peckham, J.*, absent.

RAILROADS. AMENDMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

In re application of The Rochester, Hornellsville & Lackawanna R. Co., *respt.*, to acquire lands of Francis G. Babcock et al. *applts.*

Decided June, 1887.

In proceedings to acquire lands for a railroad, the petition omitted to state the residences of the persons interested in the lands proposed to be taken. *Held*, That as such persons had appeared by attorneys, this was sufficient to give the court jurisdiction, without an amend-

ment, but the amendment was one which the court had power to make in its discretion.

The presumption is that a foreign company, organized for the construction of railroads, is authorized by its charter or the laws of its creation to take and hold stock in a railroad company of this State, and the burden of proof rests upon those who assert the contrary.

Appeal from order confirming report of referee and appointing commissioners of appraisal.

The petition for appointment of commissioners omitted to state the residences of the persons interested in the lands proposed to be taken; but the Special Term made an order permitting an amendment to supply the omission.

F. S. Smith, for respt.

J. M. Stevens, for applt. RR. Co.

E. F. Babcock, for the land-owners.

Held, That as the persons so interested had appeared by attorneys, this was sufficient to give the court jurisdiction, notwithstanding the defect in the petition, without an amendment; but the amendment was one which the court had power to make in its discretion, and appellants were not prejudiced thereby. 67 N. Y., 371.

It was contended that petitioner has not complied with all of the pre-requisites required by statute to confer jurisdiction to appoint commissioners; that \$10,000 for each mile of the proposed road had not been subscribed to the capital stock, as The General Construction Company, a subscriber for 1,776 shares, aggregating \$177,-

600, had no power to subscribe for stock, that its subscription was *ultra vires* and void. It does not clearly appear whether the Construction company was a corporation or co-partnership, or what it was. It was a company organized under the laws of New Jersey for constructing railroads, and the treasurer testified that he subscribed for this stock.

Held, That this made out a *prima facie* case, for in the absence of evidence to the contrary it cannot be assumed that it was not authorized to subscribe for, take and hold stock in a railroad company. 79 N. Y., 454.

Milbank v. N. Y. Lake Erie & Western R. Co., 64 Barb., 20, is not in conflict with this view, for there it was a competing railroad company, organized under the laws of this State, that had purchased and acquired the stock in another railroad. It was held that such company was not authorized by its charter to purchase stock in another company, unless it acquired the stock in payment of some debt or claim. But this has no application to a construction company, for in many cases these companies are paid in part for the work performed in constructing the railroad out of the capital stock. For aught that appears, this company may have been specially authorized to subscribe for stock in railroads. At least the burden of showing that it was not rests upon appellants. 99 N. Y., 12.

Whether or not the proposed embankment along the river will cause injury to other lands is not

properly before us for consideration in these proceedings.

Order affirmed.

Opinion by *Haight, J.*; *Smith, P.J.*, and *Bradley, J.*, concur.

CRIMINAL LAW. EVIDENCE.

N. Y. COURT OF APPEALS.

The People, *appls.*, v. Elliott, *respt.*

Decided June 28, 1887.

Evidence sufficient to corroborate the evidence of an accomplice.

Defendant was indicted for the crime of forgery in the second degree charged with the second offense. He was convicted and sentenced to imprisonment. The principal evidence against him was that of the accomplice. It was also proved by other testimony that the defendant had once before been tried and convicted of the same crime; that he and the accomplice were acquaintances and associates; that for some days prior to the commission of the offense he was in the city where it was committed under an assumed name, although he had no apparent business there and did not explain his presence. The defendant when arrested, by his actions and conversation, indicated that he knew about the forgery.

George A. Benton, for *appls.*

P. E. Chamberlain, Jr., for *respt.*

Held, That there was sufficient corroborative evidence to satisfy the requirements of § 399, Code of Crim. Procedure.

It is not necessary that the cor-

roborative evidence of itself should be sufficient to show the commission of the crime or to connect the defendant with it. It is sufficient if it tends to connect the defendant with the commission of the crime. The corroborative evidence need not be wholly inconsistent with the theory of the defendant's innocence. Before submitting the case to the jury the court should be satisfied that there is some corroborative evidence tending to connect the defendant with the commission of the crime. When there is, it is for the jury to determine whether the corroboration is sufficient to satisfy them of the defendant's guilt. 104 N. Y., 591; 103 id., 182.

Judgment of General Term, reversing judgment of conviction, reversed, and judgment of conviction affirmed.

Opinion by *Earl, J.* All concur.

NEGOTIABLE PAPER. BONA FIDE HOLDER.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Elias M. Moyer v. Augustus Urtel et al.

Decided June, 1887.

The rule, that where a promissory note is made for the accommodation of the payee, but without restriction as to its use, an indorsee taking it in good faith as collateral security for an obligation incurred for the payee and indorser occupies the position of a holder for value and can recover thereon against the maker, applied.

Motion for judgment upon a verdict directed by the court subject

to the opinion of the General Term.

Action to recover upon a promissory note made by defendant Urtel payable to the order of J. F. & J. C. Schad, who indorsed and delivered the same to plaintiff as collateral security for his indorsement of their note of \$1,000, and as indemnity against all liability, losses, etc., he might incur by reason of such indorsement, and of any renewals thereof. John F. Schad died, and upon maturity of the \$1,000 note his administrator, Chas. H. Schad, procured plaintiff and Urtel to indorse another note for \$800, with which he agreed to take up and renew the \$1,000 note, paying the balance in cash, which he accordingly did. When the \$800 note became due plaintiff, at the request of said Schad, again indorsed another note for \$800 to take up and renew the former note. Plaintiff from time to time continued to indorse notes of like amount for said Chas. H. Schad, he paying the preceding notes in like manner, except two notes of \$800 each, which were both paid by and delivered up to plaintiff.

The note in suit was an accommodation note, but this fact was not known to plaintiff.

David Millar, for plaintiff.

E. C. Hart, for defendant.

HAIGHT, J.—It is contended that plaintiff had no right to allow any part of the \$1,000 note to be renewed by indorsing the \$800 note and thus relieving J. C. Schad, who stood in the position of a surety between himself and J. F. Schad, but which was unknown to plaintiff. But it appears that defendant

Urtel also indorsed this note prior to plaintiff, and knowing the facts and the use that was to be made of it, he must be deemed to have assented to this arrangement; but if this were not so, J. C. Schad was an indorser upon the note in suit, which was duly protested when it became due, and he was charged as such indorser, so that his liability still continues and to the same extent as defendant Urtel's.

It is further contended, that the transactions between plaintiff and Chas. H. Schad operated as a payment of the \$1,000 note, and not as a renewal of it; that a renewal extended the time for payment, and that defendant being a surety merely was released; but the evidence shows that on each occasion when Schad procured plaintiff to indorse another note for \$800 it was with the agreement and understanding that it was to be used to renew the former note. This being the agreement between Schad and plaintiff, it does not appear to us to be material as to the manner in which Schad procured the former note to be taken up.

It is unquestioned that the money derived upon the discount of these notes was, in each case, used to take up the former note.

But it does not appear to be necessary to determine whether the \$1,000 note was in fact renewed or paid, for if the latter, \$800 of it was paid out of the money procured upon the discount of plaintiff's note, which he subsequently paid, and by referring

to the agreement we find that it fully covers and protects him in the obligation thus incurred and paid. Plaintiff is not seeking to recover of defendant by reason of any liability of his upon the \$1,000 note, or either of the \$800 notes that were subsequently given in renewal. He is only seeking to recover of him upon his note to the Schads, which was turned out to plaintiff as collateral security, and which he took in good faith relying upon the promise of defendant as embraced in his note. No restrictions appear as to the manner in which the Schads were to use this note, and the rule is that where a promissory note is made for the accommodation of the payee, but without restriction as to its use, an indorser taking it in good faith as collateral security for even an antecedent debt of the payee and indorser, occupies the position of a holder for value, and can recover thereon against the maker. 69 N. Y., 502; 9 Daly, 446.

Judgment ordered for plaintiff upon the verdict.

Smith, P.J., and Bradley, J., concur.

ATTORNEYS.

N. Y. COURT OF APPEALS.

Starin, applt., v. The Mayor, etc., of N. Y., respt.,

Decided June 7, 1887.

In the absence of an agreement, the compensation of an attorney is not in all cases co-extensive with the taxable costs; in an ordinary case or a small number of cases the taxable costs might furnish a fair compensation, but for services in an enormous number of cases involving no

complicated questions of law and only the most simple question of fact an allowance of taxable costs in each case would be grossly excessive.

This action was brought by plaintiff as assignee of an attorney appointed by the excise commissioners in the city of New York to prosecute an action for violation of the excise laws in said county. No agreement was made as to the compensation of said attorney. His active work was included within four years, during which time he commenced 14,915 actions for violations of the law of selling liquor without a license. The names of the defendants were reported to him from the commissioners of excise, with the dates of the alleged violations, and said names were then filled in printed summons and complaints. In 8,656 of such actions the defendants appeared, a majority by one attorney, and put in answers which were simply general denials. In 1,054 of these actions judgments were taken by default on application to the court and executions issued thereon. In 1,243, notices of trial were given and they were placed upon the calendar and remained thereon twelve terms, although after the trial of four or five the judges refused to try any more. The county paid the disbursements for printing, county clerk's and sheriff's fees. The whole sum disbursed by the attorney for clerk hire and other expenses amounted to between \$3,000 and \$4,000. He collected and appropriated to his own use costs and penalties in these actions amounting to \$10,000. The

referee before whom the case was tried held that the plaintiff was entitled to recover the taxable costs in all of said actions after deducting the amount already received by him. On appeal the General Term reversed the judgment entered upon the report of the referee, the order stating that it was upon the facts as well as the law, and plaintiff appealed from the order granting a new trial to this court.

A. J. Vanderpoel, for applt.

D. J. Dean, for resp't.

Held, That the judgment was reviewable here; that the compensation of the attorney, although there was no agreement, was not necessarily co-extensive with the taxable costs; that plaintiff as assignee of the attorney was entitled to recover what his services were reasonably worth. 45 N. Y., 196, 202; 42 Super. Ct., 126.

As a mere measure of compensation for services as an attorney performed in an ordinary case, or in a small number of such cases, the rule that the attorney is entitled to the taxable costs in every case may furnish a fair rate of compensation, but upon a question of compensation for services performed in an enormous number of cases involving no complicated questions of law and only the most simple questions of fact, an allowance of taxable costs in each case would be grossly excessive.

Scott v. Elmendorf, 12 Johns., 315; *Brady v. Mayor*, etc., 1 Sandf., 569; *Rooney v. 2d Ave. R.R. Co.*, 18 N. Y., 368, distinguished.

Judgment of General Term,

reversing judgment for plaintiff, affirmed.

Opinion by *Peckham, J.* All concur.

VILLAGES. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

William Granger v. The Village of Seneca Falls.

Decided June, 1887.

Where a change in the grade or slope of a sidewalk in a village street has been made by the owner of the adjoining premises in rebuilding and it does not appear that the village trustees, by formal corporate action, have ever adopted or approved of such grade as changed, the village cannot claim exemption from liability upon the ground that plaintiff's injuries were occasioned by a defect in the mere plan of the work. The mere acquiescence of the trustees, or their omission, after knowledge thereof, to take any action in reference to the matter, is not sufficient to show an adoption or approval of the plan of the sidewalk as reconstructed.

Motion for new trial by plaintiff on exceptions taken on the trial and ordered to be heard in the first instance at General Term.

Action for injuries sustained in falling upon a sidewalk. The evidence showed that the sidewalk at the place of the accident had existed for upward of twenty years and was of a uniform grade, descending thirty-one inches in thirty-seven and one-half feet. That about two years before the accident the abutting owner erected a new block of buildings, and at that time changed the walk in order to have it come up to a better pitch with the entrance of

his store, raising it twelve or fifteen inches at the south end. That there was another owner south of him and they filled in at that point so as to give the walk a sudden pitch, so that after the walk was reconstructed in the middle section of twelve and one-half feet there was a descent of twenty inches, thus nearly doubling the pitch of the walk at that place.

Defendant moved for nonsuit upon the ground that the walk as laid was a discretionary matter of the board of trustees; that they were legislative officers and that their action was judicial in fixing the grade. Nonsuit granted.

Rogers & Harman, for plff.

R. G. Miller, for deft.

Held, Error. 26 W. Dig., 257.

The difficulty with defendant's position is that it does not appear that the village trustees had ever established or approved of the new grade of the walk as constructed by Sharp and the abutting owner south of him. Had there been formal corporate action by the board of trustees of the village thus establishing the grade, a different question would have been presented.

In *Urquhart v. Ogdensburgh*, 91 N. Y., 67, it was held that where a sidewalk had been reconstructed at a steeper grade than that originally adopted, in the absence of evidence showing by whom it was reconstructed, it must be assumed to have been the work of the city, and that the establishing of the grade was the exercise of judicial discretion, and

that that discretion extended to the new grade established. But in the same case again considered in 97 N. Y., 238, this doctrine was to some extent modified. It was then held, that while the corporation may not be liable for any defect in the original plan, and while it may adopt a sidewalk already constructed or rebuild upon a new plan, and thus secure to itself immunity, this must be done by formal corporate action, and where a change in the grade or slope has been made by the owner of adjoining premises in rebuilding, making the sidewalk dangerous for travel, the omission on the part of the corporation, after notice, to take any action in reference to the matter is not a defence to an action brought against it to recover damages for injuries caused by the defect.

As we have seen, the change in the sidewalk in this case was made by the owners of adjoining premises, and it does not appear that the village trustees have ever adopted or approved of the grade as changed by the reconstructed walk.

Motion granted, costs to abide event.

Opinion by *Haight, J.; Smith, P.J., and Bradley, J.*, concur.

PRACTICE. DEED. TOWNS.

N. Y. COURT OF APPEALS.

Vail, respt., v. The L. I. RR. Co., applt.

Decided June 28, 1887.

Where plaintiff has rested his right of recovery exclusively on his title to land, both in his complaint and the trial, it is

error for the General Term to affirm on other grounds; plaintiff must stand or fall on the question litigated by him.

A deed conveyed certain premises to a town "to be used as a highway" with the usual covenants of warranty. *Held*, that it conveyed the fee and not an easement merely; that the restricting clause operated only as a condition subsequent, and the fee remained in the town until breach and a re-entry by the grantor.

The acquisition by a town by a voluntary grant of a fee in land for highway purposes is not *ultra vires*.

This was an action in equity to restrain defendant from the occupation of certain land belonging to plaintiff. The complaint alleged the unlawful entry by defendant upon the land in question for the purpose of constructing a side track of defendant's road thereon, to be used in connection with its depot at Riverhead, and for depositing cars, engines and freight, and for loading and unloading cars. It was averred that the acts of defendant would occasion great injury, annoyance and nuisance to plaintiff, his family, business and dwelling house. Plaintiff in his complaint and upon the trial rested his right to recover exclusively upon his legal title to the land. This was the issue tried and found by the court for plaintiff and the judgment was based upon and pursued the complaint and finding. The General Term affirmed the judgment upon a ground not suggested in the pleadings or upon the trial.

E. B. Hinsdale, for applt.

Timothy M. Griffing, for respt.

Held, Error; that plaintiff must stand or fall upon the question of legal title.

The land in question was originally owned by plaintiff's father. Plaintiff was one of six devisees mentioned in the residuary clause of his father's will, by which the land in question was devised. To meet the *prima facie* evidence of the *locus in quo* in the six children of the testator defendant put in evidence a deed executed in 1848 by him and others to the town of Riverhead, which conveyed a strip "granted to be used as a highway with all the privileges thereunto belonging" for such purpose only, with the appurtenances, and all the estate, title and interest of the said parties of the first part therein." The deed contained the usual covenants of warranty.

Held, That the deed conveyed the fee of the land and not an easement merely, and that the clause restricting the use of the land conveyed for highway purposes only operated, at most, as a condition subsequent. When a conveyance in fee is made upon a condition subsequent, the fee remains in the grantee until breach of condition and a re-entry by the grantor. 11 N. Y., 315; 12 id., 121; 4 Kent's Com., 370; 24 Hun, 478.

Towns may purchase and hold lands for the use of the inhabitants. 1 R. S., 820.

The acquisition by a town by voluntary grant of a fee in land for highway purposes is not *ultra vires*.

Judgment of General Term, affirming judgment for plaintiff, reversed, and new trial ordered.

Opinion by *Andrews, J.* All concur.

FORECLOSURE. PAYMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Selden Carpenter, *applt.*, v. Edwin Andrews et al., *impl'd.*, *respts.*

Decided June, 1887.

One Phelps took an assignment of a judgment of foreclosure, and paid the face of it (\$1,468). Sometime thereafter the mortgagor's husband gave him a check for \$1,050 and his note for \$400 which Phelps indorsed and had discounted at the bank, but subsequently took it up. He was given security to protect him on his indorsement. Afterward, at the request of the judgment debtor and mortgagor, he assigned it to A. as security for a loan of \$1,400 made by him to said debtor. *Held*, That the court was warranted in finding from the facts and circumstances adduced in evidence that it was not the intention of the parties to satisfy, pay or extinguish the judgment, but on the contrary to keep it alive, in full force and effect; and that the purchaser at a sale thereunder acquired title.

Appeal from judgment entered upon a decision of the court.

Action by a judgment creditor in aid of an execution to remove a cloud upon real estate upon which an execution had been levied.

In 1865 the defendant judgment debtor, Laura Bond, being the owner of the land in question, executed a mortgage to the Genesee River Bank, upon which a decree of foreclosure was entered. In 1868 the bank assigned the decree to Phelps, who, in 1869, assigned it to Lansing Andrews, whose administrators caused the premises to be sold thereunder to Osgoodby, to whom was executed a referee's deed, under which defendant S. takes title and is in possession.

The court found as facts that it was not the intention of any of the parties to these assignments to satisfy, pay off or discharge the judgment of foreclosure, and that the same was not paid, satisfied or extinguished by Laura Bond or James Bond; that said judgment never at any time, either before or after the assignments, became *functus officio*, as alleged, but at the time of each assignment was kept alive by the acts and intentions of the parties, etc. Also, that all the defendants through whom the title to the premises passed by virtue of the judgment were purchasers in good faith, without any notice of the claim that it had been paid or satisfied. Appellant excepted to these findings, claiming that the judgment was paid while Phelps held it, and before assignment to Andrews. Phelps testified that he paid the bank for the assignment the amount of the judgment—\$1,468. That sometime thereafter he was delivered a check by J. R. Bond, husband of Laura, for \$1,050, and also a promissory note for \$400, which he indorsed and had discounted at the bank, and that he subsequently took it up. That he assigned the judgment to Andrews at the request of the Bonds; and it was alleged in the complaint that the Bonds had borrowed of Andrews \$1,400, or thereabouts, and the assignment to him was made to secure that loan. The Bonds had assigned a mortgage to Phelps to secure his liability upon said note, and he subsequently obtained the money thereon. These transac-

tions were prior to the recovery of plaintiff's judgment against the Bonds.

A. J. Abbott, for applt.

H. H. Seymour, for respts.

HAIGHT, J.—The evidence is not very specific as to the time when the various transactions took place between the Bonds and Phelps; but it is quite evident that it was the intention of the parties to keep the judgment alive. Had Andrews understood that the judgment had been paid, it is not probable that he would have loaned the Bonds \$1,400 upon an assignment of the judgment as collateral. Phelps held the judgment but a few months, and it is quite evident that he took an assignment of it and advanced the money to the bank at the request and for the accommodation of the Bonds so as to prevent a sale of their lands under the decree. The loan of \$1,400 from Andrews was about the amount of the judgment, and we think the inference may properly be drawn from the facts that this money went to pay Phelps, or to replace other money that was used to pay him, and that the transaction was the same in fact as if Phelps had taken an assignment of the decree and paid therefor the amount due upon it, and that Andrews subsequently had taken the same from Phelps, paying him therefor the same amount. If we are correct in this view of the evidence the findings of the court were proper, and the judgment should be affirmed.

Smith, P.J., and *Bradley, J.*, concur.

ADULTERATED MILK. CONSTITUTIONAL LAW.

N. Y. COURT OF APPEALS.

The People, *respts.*, v. West, *applt.*

Decided June 28, 1887.

Section 3 of Chap. 183, Laws of 1885, invades neither life, liberty nor property, and is not unconstitutional.

Affirming S. C., 26 W. Dig., 215.

Defendant was indicted under § 3 of Chap. 183, Laws of 1885, which provides, among other things, that "no person or persons shall sell, supply, or bring to be manufactured, to any butter or cheese manufactory, any milk diluted with water, or any unclean, impure, unhealthy, adulterated or unwholesome milk," etc., and declares that whoever violates the provisions of the section shall be guilty of a misdemeanor. The validity of this statute is assailed on the ground that it converts what is or may be an innocent act into a criminal offense, and that it is a restriction upon that natural liberty possessed by every owner of property to use it in any lawful way.

A. J. Knight, for *applt.*

George T. Quinby, for *respts.*

Held, That the objections raised were not good; that it is not a good objection to a statute prohibiting a particular act and making its commission a public offense that the prohibited act was before the statute lawful or even innocent and without any elements of moral turpitude. It is the province of the legislature to determine in the interest of the public

what shall be permitted or forbidden. The power of the legislature to define and declare public offenses is unlimited, except in so far as it is restrained by constitutional provisions and guaranties. A legislative act is presumptively valid, and whoever questions its validity must be able to point to some limitation or restriction, or to some guaranty in the Constitution of the State which it violates before its operation can be stayed or the court be called upon to pronounce it void. 74 N. Y., 509.

It is not necessary to the validity of a penal statute that the legislature should declare on the face of the statute the policy or purpose for which it was enacted. It is sufficient if it enacts a plain and definite rule not inconsistent with fundamental principles. An inapt or defective title to a criminal statute does not make void a provision not within the exact scope or purpose of the act as expressed in the title.

The act in question invades neither life, liberty nor property. 13 N. Y., 378; 98 id., 108; 27 id., 329; 101 id., 634; 105 id., 123; 60 id., 10; 2 Metcalf, 341; 6 Cow., 513; 11 Allen, 264; 132 Mass., 11.

The indictment in this case charged the crime in the words of the statute and alleged that defendant at a certain place on a day named committed the crime alleged.

Held, That the indictment was good as a pleading and justified putting the defendant on trial. Wharton's Crim. Law, § 364; 3 Denio, 391.

Judgment of General Term, reversing judgment sustaining demurrer, affirmed.

Opinion by *Earl, J.* All concur.

JURISDICTION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Winston Jones, assignee, *respt.*, v. The Merchants' Nat. Bk. of the city of New York, *applt.*

Decided June 18, 1887.

The Supreme Court at Special Term has no jurisdiction to correct or otherwise interfere with the minutes of the Circuit Court.

Appeal from order of Special Term, correcting minutes of the Circuit Court.

Action to recover possession of certain bonds or their value, and also certain money on deposit with defendant to the credit of plaintiff's assignor. On the trial a verdict was rendered by direction of the court for the return of the securities and said balance of money; nothing being found as to the value of the securities or the amount of the balance. After the jury were discharged and on another day the court received evidence as to value and thereafter a judgment was entered for the return of the money and the securities or the value of the securities, which was specified therein.

Defendant moved to vacate the verdict as not sufficient on which to enter judgment, the subsequent proceedings as irregular, and the judgment because not in conformity with the verdict or any decision

in the case. On the hearing the court at Special Term made the order appealed from, directing the clerk to cancel the judgment and minutes of the court and make new minutes of the trial and verdict giving a description of the bonds and their value and the amount of the balance on deposit.

George Zabriskie, for *applt.*

Burton & Harrison, for *respt.*

Held, Error. We do not think the Supreme Court at Special Term has any jurisdiction to correct or otherwise interfere with the minutes of the Circuit Court. The tribunals are so far distinct that the Special Term has no supervisory power over the minutes of the Circuit Court. On this ground, without considering any of the other points raised on the argument, the order should be reversed.

Order reversed, with \$10 costs, etc.

Opinion *per curiam*.

EVIDENCE.

N. Y. COURT OF APPEALS.

The People, *respts.*, v. Schuyler *applt.*

Decided July 1, 1887.

When a party seeks to exclude evidence under § 884 the burden is upon him to bring the case within its purview. He must make it appear that the information objected to was acquired by the witness while attending the patient in a professional capacity, and also that it was such as was necessary to enable him to act in that capacity.

A jail physician is not precluded by said section from answering a hypothetical question as to a prisoner's sanity based

solely on facts occurring before the prisoner was known to the witness, unless it appears that he is incapable of excluding from consideration facts learned and opinions formed while attending him.

Affirming S. C., 26 W. Dig., 1.

Defendant was convicted of the crime of murder in the first degree. Insanity was pleaded as a defense. It appeared that defendant in a great passion killed his child. There was no proof before the killing he said or did anything indicating unsoundness of mind or that subsequently he gave any sign, by word or deed, of insanity. He recognized the moral quality of his act—that he had violated the law and was liable to be punished. Down to the trial it does not appear he ever claimed that he killed his child while unconscious or irrational, or laboring under any delusion, but he avowed that he did it in a passion. Four physicians were called by the defense who testified that they had examined the defendant. In answer to a hypothetical question assuming such facts justified by the evidence as his counsel saw fit to insert therein, they stated that defendant was insane at the date of the crime. Four physicians were called by the prosecution, who, in answer to a hypothetical question put by the district attorney, which contained such facts justified by the evidence as he saw fit to insert therein, testified that defendant was insane.

Nathaniel C. Moak, for applt.

Charles T. Brewer, for respts.

Held, That the question of defendant's sanity was one of fact,

and with the determination of the jury, based as it appears upon a preponderance of the evidence, this court cannot interfere.

Upon the evidence there was ground for claiming that there was absence of that deliberation and premeditation which are the necessary elements of the crime of murder in the first degree, but it was not claimed upon the trial that there was not sufficient evidence of these elements for the consideration of the jury.

Held, That the determination of the jury being justified by the evidence this court is concluded.

One B. was called by the people as an expert to give evidence as to the condition of the defendant's mind at the time the crime was committed. He testified that for six months preceding the trial he was the jail physician; that as such he had medical charge of all the prisoners; that during that time he examined defendant at the request of both parties and "kept an eye on the case" and had him under his observation. There was no proof that while in jail defendant was at any time sick, or that the witness had ever attended or prescribed for him as a physician. The witness was asked a hypothetical question as to the sanity of the defendant at the time he committed the murder from which was excluded all knowledge he had of the defendant personally and which was based entirely upon facts which occurred before the defendant came to the jail. This was objected to as incompetent and im-

proper under § 834 of the Code. The objection was overruled.

Held, No error; that when a party seeks to exclude evidence under said section the burden is upon him to bring the case within its purview. He must make it appear, if it does not otherwise appear, that the information he seeks to exclude was such as the witness acquired in attending the patient in a professional capacity, but he must also show that it was such as was necessary to enable him to act in that capacity. 77 N. Y., 564.

Also held, That although the witness stated it was doubtful whether he could exclude, in answering the hypothetical question, the knowledge he had obtained of the prisoner while in jail, and that he was unwilling to say in giving his opinion as to the condition of the defendant's mind at the time of the commission of the crime that he could eliminate from his mind such knowledge, yet, as he nowhere testified that he had any knowledge he had obtained of the prisoner while attending him in a professional capacity, or that he had received any information whatever from him which was necessary to enable him to attend him as a physician, or that he ever prescribed for him as a physician, the question was competent.

Upon the trial the wife of defendant was examined on his behalf and testified that the night before the crime was committed he came home sick. On her cross-examination the district attorney sought to show that she had made

contradictory statements out of court. The witness having denied making such statements witnesses were called by the prosecution and gave evidence contradicting her.

Held, No error.

Judgment of General Term, affirming judgment of conviction, affirmed.

Per curiam opinion. All concur, except *Rapallo, J.*, who reads dissenting opinion in which *Andrews, J.*, concurs.

PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Solomon Marx et al., *respts.*, v. Robert W. Tailer, *impl'd.*, *applt.*

Decided May 13, 1887.

In a creditor's action a claim to set aside as usurious a mortgage given to one party cannot be joined with a claim to set aside as fraudulent a deed to another party where the two transactions are independent and not parts of one fraudulent scheme.

Appeal from judgment overruling demurrer to complaint.

Creditor's action to set aside certain deeds, etc., executed by the judgment debtor S. The complaint alleged that defendant T. entered into an agreement with S. to loan certain moneys at usurious rates of interest and judgment was demanded that certain conveyances to him and certain mortgages held by him be adjudged void as to plaintiff. It then alleges that subsequently S. con-

veyed certain of his property to his wife and son in fraud of creditors and that mortgages were executed thereon for the same purpose, and a power of attorney given to T. to collect rents and apply same on his mortgages, and asks that these conveyances be declared void as to plaintiffs and a receiver appointed. There was no allegation that the transaction with T. had any connection with or formed part of the scheme by which the property was conveyed to the wife and son to defraud creditors.

T. demurred on the ground of misjoinder of actions, the cause of action in which he was interested being joined with others which in no way affected him. The court overruled the demurrer, holding that but one cause of action was set up in the complaint.

Edward B. Whitney, for applt.

S. Untermeyer, for respts.

Held, Error. That at least two causes of action are distinctly set forth. It is clear from a careful reading of the complaint that the allegations affecting T.'s deed and mortgages have no relation whatever to the other conveyances of property made for the purpose of defrauding creditors. Merely because a man executes a mortgage for an usurious loan does not make the transaction fraudulent, nor does it necessarily give the creditor the right to intervene to set aside the security. 91 N. Y., 525; 9 id., 73.

It is undoubtedly true that conveyances made to different grantees in pursuance of a common de-

sign to defraud the creditors of the grantor may be attacked by a judgment creditor in a single action, but there the cause of action upon which the whole fabric of the right of recovery rests is the fraudulent intent or scheme of the grantor to dispose of his property with intent to hinder, delay and defraud creditors, and although there may be divers conveyances in perfecting this scheme, still the whole foundation of the action is the scheme itself, and hence there is but one cause of action although it may affect different individuals differently. In the case at bar the cause of action alleged against T. proceeds on the ground of usury and has no connection or relation to the cause of action set up against the other defendants, which is based on the scheme of S. to so place his property that it cannot be reached by creditors. It seems, therefore, that T. was not interested in any of the other causes mentioned in the complaint and that his dealings with S. had no relation whatever to the scheme of S. to defraud his creditors, although some of the property on which he held mortgages was subsequently conveyed by S. in pursuance of that scheme. If plaintiffs have any standing in court to attack these mortgages as usurious, it must be done by a separate action against T.

Judgment reversed and plaintiff allowed to amend on payment of costs of demurrer and appeal.

Opinion by *Van Brunt, P.J.*; *Brady* and *Daniels, JJ.*, concur.

PHYSICIANS. MALPRAC- TICE.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

Elizabeth R. Wells, *respt.*, v.
The World's Dispensary Medical
Association, *applt.*

Decided June, 1887.

The burthen is on plaintiff to prove the facts upon which his right to recover depends, and where the witnesses called by defendant have such a relation to defendant and to the transaction in reference to which their evidence is given as to present to some extent the question of credibility, yet if there is no evidence fairly tending to prove the contrary, the facts testified to by them must stand as stated, because of such burthen on plaintiff.

Physicians and surgeons assume and are required to possess, at least, ordinary professional intelligence and skill, and to exercise it in the treatment of their patients with the best of their judgment, but they are not required to insure results, or to guarantee that the consequences will be beneficial, and when their errors are those of judgment only, if they keep within recognized and approved methods, they will not be liable for the consequences.

When the condition of a patient is such, at the time of the performance of a surgical operation, as to require of ordinary professional intelligence and skill the knowledge or a reasonable apprehension that results as injurious to a patient in her particular condition, as those which did follow, would follow the surgical operation, in such case the physician or surgeon is liable for such consequences.

Appeal from judgment entered on verdict, and from order denying motion on case and exceptions for a new trial.

Defendant is a corporation having for its business the practice of medicine and surgery; and for that purpose has in its service phy-

sicians and surgeons. The complaint alleges that by the false representations of defendant by its servants plaintiff was induced to and did submit to an operation for the removal of a tumor designated as a fibroid tumor located in the walls of the uterus, with which they represented that she was suffering; that in doing so she suffered intense pain and came near losing her life, and as a consequence and by reason of subsequent neglect of defendant she was thereafter greatly afflicted with pain, and became a confirmed invalid and substantially helpless; that in fact she had no tumor, and defendant's servants, knowing that there was no tumor, made such representations and induced her to submit to the operation for the purpose of obtaining money from her; and alleges some other matters to the effect that defendant neglected and refused to render to plaintiff or to permit her to have necessary and proper treatment which her condition required. Plaintiff came from Ohio to defendant's hotel in Buffalo Oct. 22, 1879, with a view to medical treatment. She had been afflicted for several years with retroflexion of the womb and inflammation of the adjacent parts, and had been under medical treatment. Shortly after her arrival a history of plaintiff's case was taken by the medical attendants of defendant, and an examination was made, both specular and digital, and she was informed that she had a uterine tumor and they advised removal, and in a few days she sub-

mitted to the operation for its removal which was performed. The immediate effect of the operation upon plaintiff was prostration and followed by great pain in the locality, which continued while she remained at defendant's hotel, and the evidence tended to prove that since the operation she has suffered more and been less able to be about and attend to the performance of service than she had been before then. This she attributes to the alleged improper treatment by defendant while under its care, and mainly to the surgical operation before mentioned. The physicians who made the examination of plaintiff and participated in the operation were three in defendant's service, one of whom is said to make a specialty of female diseases, and had charge mainly of that department of the medical treatment of the association. Another was an operating surgeon of the establishment, and the third was the financial and business manager of the institution. They seem to have been united in the judgment that the operation should be performed, and by their evidence agree in the fact founded upon personal examination that plaintiff had at that time at the location mentioned a fibroid tumor of the size of a concord grape.

The evidence of one witness on the part of plaintiff was that he treated plaintiff for about two years prior and up to July, 1877, and incidentally thereafter until Aug. 25, 1879, less than two months before the operation was performed; that during that time

he found no tumor; that he made a digital and specular examination on Aug. 25, 1879; that there was then, as there had been, some enlargement of the neck of the uterus, but nothing he would call a tumor; that a tumor there would have to be very small to escape his observation; that there might be some difficulty about it, but if of the size of a concord grape it ought to have been discovered; that it would not necessarily be discovered by one examination; probably would be if examination had been thoroughly made; that if it had been of that size he would have noticed it; that a fibroid tumor could not have its inception and develop itself to the size of an ordinary grape in two months. Another doctor said that a fibroid tumor is of slow growth; others say that it sometimes grows rapidly and might within that time develop from an imperceptible condition to the size represented as that of this one.

Plaintiff had a verdict for \$6,000, and defendant appeals.

Adelbert Moot, for applt.

H. J. Swift, for resp't.

Held, That if the evidence of the three witnesses for defendant is to be believed there was a tumor and they removed it, and this was treated by the trial court as a question of fact for the jury and submitted to them, but these three witnesses had such relation to defendant and to the transaction of advising the operation and performing it as to present to some extent the question of the credibility of their evidence in that re-

spect, 23 W. Dig., 97; S. C. 3 East. Rep., 666, yet if there is no evidence fairly tending to prove to the contrary the fact must remain as stated by them that there was a tumor, because the burden is with plaintiff to establish the facts upon which the right to recover depends, and the mere fact that the credibility of a witness against her is involved does not have the effect to prove the non-existence of the fact so testified to. 97 N. Y., 13. And upon the whole evidence the jury may well have found that at the time the examination was made, on the 25th of Aug., 1879, the tumor was there and escaped the observation of the examiner because then much smaller than it was two months afterward. While the evidence on the part of plaintiff, in view of the other evidence (excluding the evidence of defendant's physicians) did not necessarily prove that there was no tumor at the time of the operation, yet we think it was sufficient to present a question of fact in that respect for the jury.

Defendant's counsel took exception to the submission to the jury of any question of fact other than whether or not there was a tumor, and to the refusal of the court to charge that if they found there was a tumor the verdict should be for defendant.

Held, That defendant's physicians assumed to have, and for its protection were required to possess at least ordinary professional intelligence and skill, and, with the best of their judgment, to exercise it in the treatment of plaintiff.

They were not required to insure results, or to guarantee that the consequences would be beneficial. While the responsibility of the medical practitioner and surgeon is great, and care proportionally should be observed in the exercise of his professional employment, when his errors are those of judgment only, if he keeps within recognized and approved methods, he is not liable for their consequences. 27 N. H., 460; 60 Barb., 488; 50 N. Y., 696; 10 Hun, 358; 75 N. Y., 12; 24 W. Dig., 393.

That under the assumption that there was a tumor, there is no evidence to justify the conclusion of want on the part of defendant's servants of the requisite professional intelligence unless it is found in the manner in which they treated plaintiff's case, or that the instrument was improper or that it was applied in an improper manner in the removal of the tumor; but there is evidence tending to prove that plaintiff's condition was worse after than before the operation and to justify the inference that its effect was an aggravation rather than a beneficial remedy. Plaintiff had been under medical treatment for many years and without cure. Of this defendant's doctors were advised; and assuming that they found a tumor and that in their judgment its removal was essential and would be beneficial in its results, defendant was not liable for the consequences that followed, unless plaintiff's situation was such as to require of ordinary professional intelligence and skill the knowledge or reason-

able apprehension that results as injurious as those which did would follow, and upon this question much evidence was given on the part of the respective parties and it cannot be harmonized. But we think that given on the part of plaintiff was sufficient to present a question of fact for the jury, and to permit them to find that defendant through its servants, the physicians, in concluding that the operation to remove the tumor should be made and in doing it at the time it was performed, failed to exercise the ordinary and reasonable intelligence and skill which they assumed to have when they undertook to exercise it in the treatment of plaintiff, and that the apprehension of consequences seriously unfavorable to her health and condition from such operation was within the knowledge requisite to such intelligence and skill.

The difficulty arising from the conflict of the evidence is deemed settled by the jury, and we cannot say that their finding is so against the evidence as to require or justify disturbance of their verdict,

That the statement in the complaint of the cause of action in respect to the subject last considered is not complete and may be somewhat defective, but the action was tried on the merits, in all respects, and the matter of pleading does not, nor do any of the exceptions founded upon the cause of action as alleged in the complaint, require consideration.

Judgment affirmed.

Opinion by *Bradley, J.; Smith, P. J., and Haight, J.*, concur.

INFANTS. ADVERSE POSSESSION.

N. Y. COURT OF APPEALS.

Elwood et al., *appls.*, v. Northrup, *respt.*

Decided June 7, 1887.

One who claims under a sale of infant's real estate is bound to establish by affirmative evidence that every requirement of the statute necessary to confer jurisdiction on the court to order a sale has been complied with,

Evidence insufficient to show title by adverse possession.

This was an action of ejectment. Plaintiffs claimed under the will of their grandfather. Defendants claimed under a deed executed on the sale of an infant's real estate in proceedings under the Revised Statutes. 2 R. S., 198, §§ 171 *et seq.* A compliance with the provisions of the statute was attempted to be shown by proving that a petition asking for a sale and the appointment of a special guardian was presented to the county judge; that a special guardian was appointed and a bond executed by him in due form which was duly approved. There was no proof that a reference was ordered or that the court was ever informed of the situation and value of the land, the reasons for its sale, the name of the intending purchaser, the price to be obtained, the manner of its payment, or any of the circumstances which would enable it to exercise its judgment in pronouncing upon the propriety and prudence of the intended sale, or its effect upon the interests of the infant, nor was there any proof

that a sale was ordered or that the contract of sale was ever confirmed.

D. O'Brien, for plffs.

John Lansing, for deft.

Held, That no title was acquired by the purchaser at the sale in such proceedings.

Statutory provisions in derogation of the common law by which the title to one is to be diverted and transferred to another, must be strictly pursued, and every requisite thereof having the semblance of benefit to its owner must be complied with in order to divest his title. 81 N. Y., 109; 13 Wend., 465; 20 id., 241; 65 N. Y., 299; 72 id., 186; 65 id., 196.

The burden of showing that defendant had acquired the infant's title rested upon defendant and he was bound to establish by affirmative evidence that every requirement of the statute necessary to confer jurisdiction upon the court to order a sale of the infant's property has been complied with. In the absence of proof thereof there are no presumptions in such proceedings that the material requirements of the statute have been performed.

It was also averred by defendant that he and his grantors had been in adverse possession of the premises for a period exceeding twenty-five years, under a claim of title founded upon a deed thereof from one W., dated April 11, 1856. It appeared that the premises in question were originally part of a farm which was purchased by L. and conveyed by him to W. in trust for L.'s "sole use, benefit and be-

hoof." L. died in 1845. By his will he devised a part of said farm to his daughter B. for life and after her death to her male heirs. The will provided for the payment of a mortgage on the farm by applying thereon moneys due the testator upon a mortgage against one B. for a larger sum. L. made W. one of his executors. The farm was divided among the devisees of L., and the portion in question here was set off to P., who took possession and continued to occupy the same until in 1856. The division of the farm was made with the assent of W. P. died in 1870, and this action was commenced in 1881. On the trial defendant put in evidence a deed of the premises dated in 1856, for the consideration of one dollar, from W. to defendant's remote grantor. The trial court held that at the time this deed was executed W. was a mortgagee in possession. This evidence was founded upon the following facts: After the death of W. in 1881, there was found among his papers the mortgage upon the farm, upon which was indorsed the receipt of one dollar in full discharge thereof. This indorsement was signed by B., who at that time held the mortgage. There was also found an assignment of the same mortgage from B. to W., dated May 10, 1842, which was acknowledged on the same day the discharge was executed. There was no proof that W. ever entered into possession of the property or ever claimed to hold it. The mortgage referred to in the will of W. as applicable

to pay the B. mortgage was satisfied the day after the date of said discharge. W. accounted as executor, but made no claim on account of the payment of the B. mortgage.

Held, That the grantee took no title to the property under the deed from W.; that said deed was void, as at the time of its execution W. was not in possession of the premises and had no mortgage thereon.

Judgment of General Term, affirming judgment for defendants, reversed, and new trial ordered.

Opinion by *Ruger, Ch. J.* All concur.

EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Frederick Lange, *respt.*, v. Peter Kearney, *applt.*

Decided June 18, 1887.

In an action by a surgeon for services where the plaintiff testifies that the sum to be charged in such cases depended on the pecuniary condition of the employer, it is error to exclude evidence offered by defendant as to his pecuniary circumstances.

Appeal from judgment in favor of plaintiff, entered on verdict.

Action by plaintiff, a surgeon, to recover \$750 for professional services. The services were admitted, but the value disputed. On the trial plaintiff and his witness testified that there was no fixed standard of value for surgical operations, the amount to be charged depending on the pecuniary condition of the employer. But that irrespective of such pecuni-

ary ability the services were worth \$750. Plaintiff gave no evidence as to defendant's pecuniary condition. Defendant sought to show that he was not a rich man, what his income was and what income was necessary for the support and maintenance of himself and children, all of which was excluded. The court charged that the only question was what the services were worth and that the measure of value was not what a man by his pecuniary condition was able to pay, but the actual, intrinsic value of the services. At the close of the charge the court was requested to charge that plaintiff and his witness based their estimate of the value of the services on the means of the person to be charged and that there was no evidence as to defendant's means. This the court charged. The jury returned a verdict of \$750.

E. F. O'Dwyer, for *applt.*

Hathaway & Montgomery, for *respt.*

Held, That inasmuch as the estimate of the value of the services rested, according to the statement of plaintiff himself, on the pecuniary ability of defendant to pay, and inasmuch as defendant was not permitted to show what his pecuniary condition was, and thus directly to affect the estimate to be made of the value of the services according to the theory of plaintiff himself, its exclusion was error.

Judgment reversed and new trial ordered, costs to appellant to abide event.

Opinion *per curiam*.

BILL OF PARTICULARS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Lotta Weiler, *respt.*, v. William Mooney, *impl'd.*, *applt.*

Decided June, 1887.

In an action by a judgment creditor to set aside a release given by the debtor to the defendant, the latter set up in his answer that the debtor was indebted to him in a certain sum on account of moneys advanced, and that the release was given in consideration and in satisfaction of such indebtedness. *Held*, That a bill of particulars was properly ordered, notwithstanding this allegation was unnecessary to be inserted in the answer, and the facts might be proven under a general denial.

Appeal from order requiring defendant to deliver to plaintiff a bill of particulars.

Harris & Harris, for *applt.*

James Murphy, for *respt.*

HAIGHT, J.—This action was brought by the plaintiff as a judgment creditor to set aside the release set forth in the complaint, upon the ground that the same was made by collusion, with intent to defraud the plaintiff. The answer denied the allegations of the complaint in regard to fraud and want of consideration, and alleged that at the date of the release William Mooney, the uncle, was indebted to defendant William Mooney, the nephew, in a large sum of money, to wit., in the sum of upwards of \$1,500, being for money advanced by defendant to his said uncle, and for which said uncle had for or on account of the rent of the premises referred to in the complaint, and

that being so indebted he, the uncle, in consideration of such indebtedness and in satisfaction thereof made and delivered to the defendant the release mentioned in the complaint.

It was upon this clause of the answer that the court ordered a bill of particulars. The appellant now contends that the allegation was unnecessary and that all he desired to prove could be given under this general denial, and he now offers to amend by striking this clause out of the answer. The insertion of the allegation in the answer doubtless led the plaintiff to suppose that it was there for some purpose, and if it is to be retained the bill of particulars ordered is properly within the discretion of the Special Term.

Order affirmed, with \$10 costs.

Smith, P.J., and *Bradley, J.*, concur.

FORECLOSURE. PARTIES.

N. Y. COURT OF APPEALS.

Johnston, *respt.*, v. Donovan et al., *appls.*

Decided June 21, 1887.

A party making an application under § 452 does not forfeit his right to be made a party and defend his title because he has omitted to record his deed, provided his application is made in due time.

Application to be made parties defendant in an action of foreclosure was made before answer on a petition stating that the defendant took the conveyance to himself in trust for the applicants and subsequently conveyed to one of them in trust for both, which deed was not recorded. *Held*, That a case was made out within the statute.*

This was an action for the fore-

closure of a mortgage on real property, executed by the defendant, T. D., to whom the premises were conveyed by the mortgagee March 31, 1880. Prior to the commencement of this action and on Feb. 20, 1883, T. D. conveyed the premises to J. D. subject to the mortgage, the deed containing a covenant of assumption by J. D. When this action was commenced that deed had not been recorded. J. D. still holds the legal title to the mortgaged premises. Before the time for answering had expired a petition was filed by J. D. and S. D., under § 452 of the Code, to be made parties defendant. The petition set forth the above facts and also that the original conveyance to T. D. was taken by him in trust for his brothers, J. D. and S. D., and that the subsequent conveyance to J. D. was taken by the latter in trust for himself and S. D., and that the land was originally purchased by them as partners and the title taken in the name of T. D. for their joint benefit. The prayer of the petition was denied.

George C. Holt, for applts.

Hamilton Wallis, for respt.

Held, Error; that the fact presented made a case as to the petitioner J. D. directly within the statute.

It is no answer to such an application that the plaintiff was not in fault in bringing the action against the person having the record title, or, that if the action had proceeded to judgment the petitioner would have been bound thereby. A party making an application under § 452

of the Code is not compelled to commit his defense to the hands of a stranger to the title, and the real owner of real property does not forfeit his right to be made a party to an action and to defend his title in that character because he has omitted to record his deed, provided his application is made in due time.

As to whether a valid trust is shown either in T. D. or J. D., and as to whether the petitioners are not in a position to defend against the mortgage, *quære*.

Order of General Term, affirming order denying motion, reversed, and application granted.

Opinion by *Andrews, J.* All concur.

PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Thomas F. Stark, *applt.*, v. Asa T. Soule, *respt.*

Decided June, 1887.

Where on the trial of an action by the court at Special Term the evidence on the part of the plaintiff is sufficient to call upon the court to consider the question of fact, it is error for the court to dispose of the case without consideration of the facts and treat the case as raising questions of law only.

Appeal from judgment entered upon decision of Special Term dismissing complaint on the merits.

Action upon an alleged fraud and its purpose to rescind an agreement made July 1, 1880, which was performed by the parties to it. Plaintiff alleges that he and one Hess were, by fraud on the part of defendant, induced to transfer to

him certain stock in a corporation of this State of which defendant was and had been for a considerable time prior thereto, the president and managing officer. The alleged fraud consisted in the concealment from them of the value of the stock so transferred and in the representation that it had no value. Plaintiff took from Hess an assignment of his interest in the subject of the action and cause of action and the relief asked was the rescission of the agreement and the surrender and restitution of the money and property advanced and transferred in its performance by them respectively as of the time of performance. The allegations of the complaint essential to the cause of action alleged were put in issue by the answer.

At the close of evidence on the part of plaintiff on the motion of defendant the court dismissed the complaint on the merits, and plaintiff excepted. The court made a written decision as follows, viz.: "That the allegations of fraud, fraudulent misrepresentations and fraudulent concealments alleged in the complaint and those that plaintiff or said Hess were deceived and defrauded thereby are unsupported by the evidence," and directed judgment of dismissal of the complaint on the merits.

A. J. Abbott, for applt.

J. Willing, for respt.

Held, That the evidence presented a question of fact for the determination of the trial court whether or not plaintiff was entitled to relief. We are inclined to think that the case was not so treated by

the court, but that it was there held as matter of law that whatever view which could be taken of the evidence, its weight or credibility, it was insufficient to support a recovery, the fact that the motion to dismiss was made and disposed of as it was, and the form given to the finding tend to show that was the view of the trial court.

Judgment reversed and new trial granted.

Opinion by *Bradley, J.; Smith, P.J.*, concurs. *Haight, J.*, not voting.

FIRE INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John H. Diver, applt., v. The London & Lancashire Fire Ins. Co., *respt.*

Decided June, 1887.

Defendant's agent agreed to insure plaintiff a certain sum on his store and stock, but leaving it to be understood that he would make application to the companies he represented and get the rates as low as possible. After writing policies in different companies, which were successively rejected, the agent, on May 28, wrote out a policy in defendant company, which he delivered the day after the fire (June 1), upon receiving the premium, but the company promptly repudiated the transaction. *Held*, That no oral contract of insurance had been consummated prior to the issuance of the policy.

Appeal from judgment entered upon a decision of the Monroe Equity Term.

Action upon a parol agreement for insurance. The court found as facts, that on May 5, 1885,

plaintiff went to D., one of defendant's agents, and asked him for insurance on his store and stock and what rate he would give; D. said "he would start at 1½ per cent. and did not think he would have to go higher than 2½ per cent." Plaintiff said he could insure him \$2,000 on the building; D. said he would like to have plaintiff put in some stock as it would help a little in the rates, the insurance companies would view it a little better; plaintiff then told D. he could put in \$1,000 on the stock, and D. said he would insure plaintiff for \$3,000. D. then wrote out a policy in the C. company for \$1,000 on the building and \$500 on the stock, which was subsequently canceled by direction of the company, after running seven days. D. then wrote out a similar policy in the G. company, which was ordered canceled six days thereafter; then in the A. company, which policy ran four days and was ordered canceled. May 28 D. made out a similar policy in defendant company, leaving blank the date. Building, etc., were destroyed by fire May 31, 1885, and on June 1, plaintiff paid the premium and the policy was delivered to him by defendant's agent, with knowledge of the fire. The question was whether there was an oral contract to insure.

E. A. Nash, for applt.

S. D. Bentley, for respt.

Held, That no oral contract to insure was consummated.

The conversation between plaintiff and D. indicates that the

agent did not assume the responsibility of fixing the rate himself, but leaving it to be understood that he would make application to the companies that he represented for insurance, and that he would get the rate as low as he could. This is apparent from what subsequently followed, for it appears that he tried by writing policies in different companies which were rejected, until he finally wrote the policy in defendant company the day before the fire, and notified it on the evening of that day, which on receiving the notice declined the risk.

Again, in the making of a contract the minds of the parties must meet. In the alleged oral agreement nothing appears to have been said in reference to the company, or the conditions of the policy that should be issued, but the company may be understood as one represented by the agents making the agreement, and the conditions those usually embraced in policies issued by companies doing that class of business. At least, when plaintiff paid and accepted the policy, in the absence of evidence to the contrary, he must be deemed to have acquiesced in the conditions embraced therein as forming a part of the contract. Now this policy contained the condition, that if the insured should have any other insurance on the property insured, or any part thereof, without defendant's consent written on the policy, it should be void. Also, that defendant should not be liable by virtue of the policy until the

premium be paid, or a valid receipt given therefor duly impressed with the seal of the company. It appeared that there was other insurance of \$1,000 upon the stock in another company, and that this insurance was not disclosed to or known to have existed by defendant's agents, as the court has found. It further appears that the premium was not paid until after the fire occurred, so that under the conditions of the policy there can be no recovery, and there is no evidence from which we can say that these conditions were not understood as forming a part of the oral agreement.

Judgment affirmed.

Opinion by *Haight, J.; Smith, P.J.*, and *Bradley, J.*, concur.

TAX SALE.

N. Y. COURT OF APPEALS.

Remsen et al., applts., v. Wheeler et al., respts.

Decided June 7, 1887.

Plaintiffs sold certain real estate to one L., who agreed to pay a certain sum, less what he had to pay for taxes and assessments. L. paid certain amounts to redeem from sales for water rates, which sales were void. *Held*, That plaintiffs by receiving the balance of the purchase price ratified the payment so far as L. was concerned, and that defendants could not dispute that the money paid was theirs and was in effect paid by them.

Until the money paid on a redemption reaches the hands of the purchaser at a tax sale it cannot be deemed a voluntary payment to him.

This action was brought to restrain the city of Brooklyn from paying over to W., the purchaser

at an assessment sale, a sum of money and to compel the same to be paid to plaintiffs. It appeared that plaintiffs owned a tract of land in the city of Brooklyn which had been assessed for water rates as vacant land, under § 24 of Chap. 396, Laws of 1859. Said land had been sold for non-payment of the water rates so assessed. The plaintiffs entered into a contract for the sale of the land with one L., who agreed to pay therefor a certain sum after deducting such amount as L. should be obliged to pay "in the discharge of taxes, water rates and assessments and sales for each of the same in order to free said premises or any portion thereof from the liens of the same or the clouds thereon." Among other payments L., with the assent of plaintiffs, paid to the registrar of arrears a sum sufficient to redeem the land from sales for water rates. No defense was made to this action by the city. The sales were void. It was claimed by W. that although the sales were void, L. having paid the money to discharge the assessments, he was entitled as against plaintiffs to receive it.

A. P. Bates, for applts.

Jesse Johnson, for respts.

Held, That the money having been paid by L. for plaintiffs' benefit and by receiving the balance of the purchase money they have ratified the payment so far as L. is concerned, and W. cannot dispute that the money paid was plaintiffs' and was in effect paid by them; that the city is a mere depository of the money and until

it reached his hands it could not be deemed a voluntary payment to him, and the plaintiffs had a right to reclaim it.

In imposing assessments under the act of 1859, as in imposing other assessments and taxes, the lot owners were entitled at some stage of the proceeding to a notice and an opportunity to be heard, and unless the law provided for such notice and hearing before the board authorized to impose the assessment, it was unconstitutional and void. 74 N. Y., 183.

Judgment of General Term, affirming judgment for defendant, reversed, and new trial granted.

Opinion by *Earl, J.*; *Ruger, Ch. J.*, *Rapallo* and *Peckham, JJ.*, concur; *Finch, J.*, reads for affirmance; *Andrews, J.*, concurs; *Danforth, J.*, does not vote.

EXECUTOR. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

In re settlement of Franklin Hall, executor.

Decided June, 1887.

An executor, on the final settlement of his accounts, having shown authority from his testator to furnish goods, etc., to a third party, on account of his testator, is competent to give evidence of the fact that he did furnish such and what goods, as such evidence does not call for a personal transaction between the witness and his testator; but, although such evidence is erroneously rejected, such error does not require a reversal of the decree of the Surrogate's Court, if it can be seen that no prejudice resulted, or could result from such error.

Appeal by an executor from a

portion of the decree of the Surrogate's Court of Seneca Co. settling the accounts of appellant as executor.

The testatrix died Nov. 3, 1875, leaving a last will of which the appellant was executor; he presented and filed his accounts for a final settlement and adjudication, and the residuary legatees interposed objection and contested the same. The account as filed by him produced a balance of \$101.12 for distribution, subject to deduction of the amount of his commissions and the costs and expenses of the accounting. The decree of the surrogate made the balance against him \$669.56 reduced by commissions and costs and expenses of the accounting to \$533.32 for distribution.

William Austin, for applt.

William C. Hazelton, for respt.

Held, The executor having been called as a witness in his own behalf and asked "Did you furnish groceries, meats, butter, provisions, and articles of dry goods to Maria Burrall charged in schedule 'D' of account, from May 9, 1874, to Oct. 27, 1875?", and an objection having been made that the witness was not competent to testify on the subject, and followed by an exception, it having already appeared that the goods were furnished for support of Maria were furnished within his authority received as agent from his testatrix; that, the inquiry did not call for a personal transaction between the witness and his testatrix, and the objection as made was not a good one, 104 N. Y. 157,

but that this error does not require a reversal of the decree, if it is seen that no prejudice resulted or could result to the appellant from the exclusions of this evidence, Code Civ. Pro., § 2545; *in re* will of Smith. In the view taken of the evidence, the introduction of this evidence could not in any extent have changed the result.

Decree affirmed.

Opinion by *Bradley, J.; Smith, P.J., and Haight, J.*, concur.

MASTER AND SERVANT. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

John Y. Monaghan v. The N. Y.
C. & H. R. RR. Co.

Decided June, 1887.

The relation of representative, in the sense requisite to render the performance of an act of the servant that of the principal does not necessarily depend upon his rank, but upon the character of the service called upon to perform; and when an employer has organized a proper system, and made sufficient rules for the purpose of carrying it out, with reasonable safety to its employees, it is sufficient that competent men are employed to conduct that system according to the established rules.

Where an engineer undertakes to operate and run a locomotive engine known to him to be defective, he takes the hazard of such known defects, and such circumstances it cannot be said, in view of his profession and experience that he did not appreciate the situation or conditions and inconvenience that might arise from them.

Motion by the plaintiff for a new trial on exceptions taken at

Circuit and ordered heard at General Term in the first instance.

Action to recover damages for personal injuries to plaintiff alleged to have been occasioned by the negligence of defendant. At the close of the evidence on the part of plaintiff a non-suit was directed, he moves for a new trial.

Plaintiff was a locomotive engineer in the service of defendant and on the morning of May 21, 1882, after his engine was detached from his train, he attempted to run to a "Y" in the western part of the city of Rochester to turn around, and having done so was proceeding east with his engine when it was run into by another engine and plaintiff received the injury complained of. When plaintiff came into the Child street crossing a signal was given him to stop, which he endeavored to do by shutting off steam and reversal of the motive power of his engine, and seeing that did not stop the engine and it was too far ahead to stop in time to avoid a collision with a train approaching the same track, he concluded to restore the power to give it forward motion, and in his attempt to change the reverse for that purpose the throttle blow out and he could not effect the change by the lever, and the pressure of the steam remained reversed and tended to stay the motion forward, although the pressure was so low that the engine continued to move ahead, and the approaching engine struck the tender of plaintiff's engine producing the injury complained of. Plaintiff

charges that the injury was occasioned by the defective condition of the engine; also that plaintiff was placed in the position which caused the collision by the fault and negligence of defendant's telegraph operator at Childs street station, and that his negligence was that of defendant.

Wm. S. Oliver, for plff.

A. H. Harris, for deft.

Held, That the relation of representative in the sense requisite to render the performance of an act of the servant that of the principal does not necessarily depend upon his rank in the service, but upon the character of the act he is called upon to perform. 81 N. Y., 516. In view of the situation at the locality in question defendant had organized a system with a view to the operation with reasonable dispatch and safety of this portion of the road. It had made rules for that purpose of which plaintiff was advised, and had employed men to conduct that system and direct its execution, to and in the observance of the rules so provided. There is no question about the sufficiency of those rules and their reasonable application to the situation. The telegraph operator was charged with important duties at that point, as upon him was imposed the duty of controlling and directing the movement of trains there. This was within the system which the rules provided for at that particular locality and did not make the *alter ego* of defendant, 85 N. Y. 61; it was only a grade in the employment and it is sufficient that he was

competent for the place, which is not questioned. 98 N. Y., 211; 55 id., 608; 84 id., 77; 26 W. Dig., 153.

It was alleged and there was evidence tending to prove that the engine was defective; that the flues leaked; that the valves of the steam chest leaked; that the throttle leaked, and the brakes were out of repair and useless and in consequence of which it was stated that it was difficult to keep up the fires so as to maintain the requisite pressure of steam to give the engine sufficient operative power, and that this had been so for some time. It also appeared that although this was the first time plaintiff had run this engine that his attention had been called to its defects.

Held, That so far as these defects contributed to the accident and injury it was within the hazard assumed by him, as they were known to him when he took charge of the engine in the morning, and had been observed by him on the trip and before he returned to Rochester. If it had not appeared by the evidence that plaintiff knew of the useless condition of the brake of the engine before it was detached from the train and he undertook to take the "Y," we should be inclined to think there was a question for the jury to say whether use of it if in order may not have been effectively made to prevent the accident and injury to plaintiff, but under the circumstances and in view of his profession and experience it cannot be said that he did not appreciate the situation, or the con-

dition and the inconvenience that might arise from them.

101 N. Y. 373; 98 id., 274.

Motion for a new trial denied and judgment ordered on the non-suit.

Opinion by *Bradley, J.; Smith, P.J.*, and *Haight, J.*, concur.

EMINENT DOMAIN. DAMAGES. EVIDENCE.

N. Y. COURT OF APPEALS.

Drucker, respt., v. *The Manhattan R. Co. et al.*, *appls.*

Decided June 7, 1887.

In an action for damages caused by the erection of an elevated railroad in front of plaintiff's premises evidence that business in that vicinity had largely fallen off is admissible as proof of general injury from which the jury is to determine how much thereof was caused by the construction and operation of the road. Smoke and gases, ashes and cinders, drippings of oil, columns, the structure itself and the passage of cars are elements of damage, even though the necessary concomitants of the construction and operation of the road and not the product of negligence, and to the extent that they impair the owner's easement of light, air and access are subjects of redress.

This action was brought to recover damages for the alleged impairment of plaintiff's easement of light, air and access appurtenant to his land on Division street in the city of New York by the construction and maintenance of an elevated railroad in front thereof and along said street by the defendant the Metropolitan Elevated R. Co., and by the defendant the Manhattan R. Co., the lessee of the former company. The action was tried upon the assumption

that plaintiff owned the fee to the center of the street, or if not that he had in it as abutting owner an easement of light, air and convenient access. No question was raised in regard to either of these claims by the defendant.

Julien T. Davies, Edward S. Rapallo and Charles A. Gardiner, for *appls.*

Roger Foster, for *respt.*

Held, That no such question could be raised upon appeal.

Proof was received, under objection, that since the building of the elevated road the trade and business of Division street had fallen off and the current of custom had largely lessened in volume and changed in character.

Held, No error; that to measure and appreciate plaintiff's individual loss the nature and extent of the general injury was necessarily to be considered, and to ascertain how much plaintiff was harmed by the impairment of his easement required a survey of the general facts and a deduction from them of the particular and special damage to be estimated.

The evidence tended to show that by reason of the falling off of business rental values on the street had seriously diminished; it was also established that this result was due in part to a tendency of business to move uptown, with which the elevated roads had nothing to do.

Held, That how much of the diminution of rental values was due to the construction and operation of the elevated roads and what part of that portion was caused

by the impairment of plaintiff's easement was the problem of damages, which could only be solved by taking into view the general loss and its nature and extent, and then estimating out of it the part or share suffered by plaintiff from the taking or impairment of his easement; that although this could not be done with any certainty or precision a recovery could be had.

When all the proof which in the nature of a case is fairly possible has been given the good sense of the jury must provide the answer, and it is no defense that such judgment involves more or less of estimate and opinion having very little to guide it. That criticism has no force in the mouth of the wrongdoer when all reasonable data have been furnished for consideration.

Also held, That smoke and gases, ashes and cinders affect and impair the easement of air. The structure itself and the passage of cars lessen the easement of light, the drippings of oil and water and possibly the frequent columns interfere with convenience of access. These are elements of damage, even though the necessary concomitants of the construction and operation of the road, and not the product of negligence, for they abridge the land-owner's easement, and to that extent at least are subjects for redress in an action for damages.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Finch, J.* All concur, except *Rapallo* and *Peckham, JJ.*, not voting.

ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Charles Hingston, *respt.*, v. Jose R. Miranda, *applt.*

Decided May 13, 1887.

An affidavit by an agent simply stating on information and belief that a cause of action exists and that a certain sum is due over all counterclaims known to plaintiff and that affiant's knowledge and belief are correspondence with plaintiff is insufficient to support an attachment.

Appeal from order denying motion to vacate attachment.

The attachment was obtained on an affidavit made by one D., which stated on information and belief that a cause of action on contract, other than a contract to marry, existed in favor of plaintiff against defendant for money loaned, and services rendered, and that a sum specified was due to plaintiff from defendant over and above all counterclaims known to plaintiff, and that deponent's knowledge and the grounds of his belief are correspondence with plaintiff and cables received from him by deponent's firm informing them of said matters.

Motion was made upon the papers on which the attachment was granted to vacate it, which motion was denied.

Jose G. Morales, for *applt.*

George A. Black, for *respt.*

Held, Error. The affidavit on which this attachment was issued was wholly insufficient as proof of the facts upon which alone the law allows so harsh a proceeding to be taken by a creditor against

his debtor. It contains no sworn evidence that a debt has been created or that the amount claimed is due to plaintiff over and above all counterclaims, and is no more than a repetition of unsworn statements made by plaintiff or in his behalf to the person making the affidavit. In fact, it does not amount to as much as that, for the statements themselves have not been set forth in the affidavit showing that they had been followed by the person who made it. The case is clearly within those in 16 Abb., 295; 35 Hun, 395; *id.*, 541; 41 *id.*, 61.

Order reversed, with \$10 costs, etc.

Opinion *per curiam*.

REMOVAL. N. Y. CITY.

N. Y. COURT OF APPEALS.

The People *ex rel.* McCabe, *respt.*, v. The Board of Fire Com'rs., *applt.*

Decided June 21, 1887.

The want of skill for which an officer must be responsible under the general rules governing the fire dept. of N. Y. City is that from which unnecessary loss of life or property actually results.

The relator was second assistant chief of the fire department of the city of New York. Charges were preferred against him for incapacity and for sending out a simultaneous call "without due cause and reason" and for want of judgment or skill on his part, which may have caused unnecessary loss of life, limb or property, uncovering and depriving of all fire extin-

guishing apparatus, and seriously endangering life and property in a large and important section. There was no evidence showing that any want of skill, judgment, neglect or failure of the defendant did as matter of fact cause unnecessary or any loss of life, limb or property. The relator was convicted and on appeal to the General Term the judgment of conviction was reversed.

D. J. Dean, and *Wm. L. Findley*, for *applt.*

Elihu Root, *Roswell D. Hatch* and *George B. McCloskey*, for *respt.*

Held, No error, there being no evidence to sustain such conviction; that the want of skill for which an officer must be responsible under the general rules governing the fire department is that from which unnecessary loss of life or property actually results.

Section 2140 of the Code of Civ. Pro. which provides for a review of common law *certiorari* of its determination by the court granting the writ and upon the hearing upon the return that the court may inquire among other things whether there was any competent proof of all the facts necessary to be proved, and if so "whether there was upon all the evidence such a preponderance of proof against the existence of any of those facts that the verdict of a jury affirming their existence rendered in an action in the Supreme Court triable by a jury, would be set aside by the court as against the weight of evidence," but in a case where the evidence was

sufficient to call for the exercise of the discretion of the Supreme Court in reversing on the facts as against the weight of evidence this court cannot interfere with the determination of the General Term.

In cases involving a plain violation of the well known rules governing applications for a new trial on the ground that the verdict is against the weight of evidence or where there was an abuse of discretion this court may review the decision below.

Appeal dismissed.

Opinion by *Peckham, J.* All concur.

DEPOSITIONS. APPEAL.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Harmon M. McLean, *respt.*, v. Alonzo Adams, *applt.*

Decided June 18, 1887.

A commissioner to take testimony should be a person who has no bias or prejudice in reference to the litigants on the cause. Where a party thinks his right to a fair and unbiased commissioner has been denied him he may appeal without waiting the return of the deposition or moving to suppress it.

Appeal from order appointing a commissioner to take testimony in Nicaragua.

Action to recover possession of certain rubber or its value. After several attempts to procure the testimony of witnesses at Cape Gracias a Dios on commission, the several commissioners appointed refusing to act, this order was made appointing one C. as such

commissioner. It appears that C. is a correspondent of plaintiff's agents at New York, who are competitors in business at Cape Gracias with defendant's New York agents. On this motion C. made an affidavit in which he states that he has understood that defendant had trouble with the former commandante "arising out of some charges that defendant had smuggled goods into Cape Gracias."

Joseph A. Shoddy, for *applt.*

J. Hampden Dougherty, for *respt.*

Held, That the appointment of C. was improper. The precise relation which he bears to plaintiff's agents by reason of being their "correspondent" is not disclosed; but there can be no doubt it is a friendly one. There is also some evidence of unfriendly feeling on his part toward defendant. A person who stood perfectly indifferent between the parties would hardly have made this affidavit voluntarily. A commissioner to take testimony should be a person who has no bias or prejudice in reference to the litigants or the cause. While the functions of such an officer are regulated and strictly limited by statute, his powers are nevertheless capable of abuse, to the serious detriment of one party or the other, and where such abuse occurs it may often escape discovery when the commission is executed in a distant land. The best safeguard against the occurrence of any wrong of this kind is the selection of a commissioner to whom no suspicion

of partiality can attach. It cannot reasonably be said that C. is such a person.

The learned counsel for plaintiff concedes in his brief that "If Cape Gracias furnished a large choice it would be better to appoint a commissioner having no business correspondence with any of the parties or their agents." With reference to this observation it may be remarked that although the papers show that the number of persons at Cape Gracias a Dios capable of acting as commissioners is not large, there is no satisfactory proof that someone cannot be found there who is both competent and impartial.

Also held, That a party is entitled as a matter of right to the appointment of a fair and unbiased commissioner, and if he thinks that right has been denied him he may procure the order to be reviewed by appeal without waiting for the return of the deposition and then moving to suppress it.

Order, so far as appealed from, reversed, and case remitted for appointment of a new commissioner.

Opinion by *Bartlett, J.*; *Van Brunt, P.J.*, and *Daniels, J.*, concur.

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LIFE INSURANCE. WAIVER.
N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

John R. Baker, *respt.*, v. The New York State Mutual Benefit Association, *applt.*

Decided June, 1887.

The provisions of a life policy requiring a

prompt payment of the stipulated periodical payments is a condition precedent, but such prompt payment may be waived by the insurer, and in such case the contract remains in full force.

When the application for insurance contains a provision that the contract will become null and void on default of payment and also contains an agreement to pay all dues and assessments until the "member" shall give notice of withdrawal and makes reference to the by-laws, which require compliance with the stipulations of the application and provide that the "Member shall be held liable to the association for all dues and assessments until he shall have given notice of his desire to withdraw," and further provides that in case of default "Such membership shall cease and determine at once without notice, and all claim shall be forfeited to the association. It seems that it leaves it optional with the "association" to terminate or treat as terminated the relation of a "member" of one who is in default, or to continue his relation and charge him with liability to pay dues and assessments until he gives notice of his withdrawal.

In this case there was sufficient evidence to properly present the question of fact to the jury whether defendant waived the prompt payment of dues and assessments.

Appeal from judgment entered upon verdict and from an order denying a motion for a new trial.

Action to recover upon a certificate of membership, issued by defendant to Samuel E. Baker, by which upon the terms and conditions therein mentioned and referred to, it undertook to pay plaintiff a sum not exceeding \$2,000, to be produced by assessments, etc., after the death of the member whose life was so insured. The member died July 9, 1884. Defendant declined to pay, and the trial of this action resulted in a verdict of \$1,500, for plaintiff.

Defendant was incorporated 1881 pursuant to Laws of 1848, Chap. 319, and the act amendatory, and had the power, which it exercised, to make by-laws. It was alleged that the member had by default in payment of his dues and assessments forfeited his right of membership, and his relation as such to defendant had ceased before his death. By his written application for membership by him subscribed it was agreed that if he "neglected to pay any of the assessments or annual dues the contract shall become null and void, and all moneys which have been paid shall be forfeited to the society," and agreed to be subject to the by-laws and regulations of the association and to pay all dues and assessments until he should give notice of his wish to withdraw from the association, and by the certificate of date of Feb, 27, 1883, it was provided and agreed that the member should pay his dues and assessments within thirty days (which was afterward made thirty-five days,) from the date of notice and in case the stipulations in the application and certificate should not be complied with, the certificate should cease and determine without notice, and the payments made thereon should be forfeited to defendant and it was not liable to pay the sum mentioned in the certificate. Notices of assessment and dues of date of Jan. 1, of dues, of March 1 and of May 1, were given, and default made in payment, and it was alleged that by the default Baker sundered his relation as a member

of the association, but a like notice of dues and assessment came from defendant's office addressed to Baker of the date of July 1, 1884, and was taken from the post office at Hornellsville, his place of residence, July 8, the day before he died, by which he was notified to pay the amount \$2.10 in thirty-five days and containing the further statement that "Having no deaths we omitted our usual assessments for March and May, this includes deaths reported to date." And by letter dated May 20, 1884, the secretary advised Baker that his assessment of Jan. had not been paid and added, "You make a great mistake in not keeping up the insurance. * * * Let me hear from you by enclosed postal if you want to drop out." After the death of Baker and before the expiration of thirty-five days after the receipt of the notice of July 1, 1884, the plaintiff as beneficiary tendered payment of all unpaid dues and assessments which defendant refused to accept.

John J. Lamoree, for applt.

George U. Loveridge, for respt.

Held, That the provision of a life policy declaring its invalidity on and by reason of default in the stipulated periodical payments is a condition precedent, which must be observed to support the contract of insurance, 63 N. Y., 160. The prompt payment, however, may be waived, and the right to treat the contract forfeited thus suspended. And in the case at bar the inference was permitted that defendant intended to, and did treat Baker as a member of the

association and liable to pay his dues and assessments up to the time of his death.

That under the provisions of the application, certificate and by-laws, while the first has a provision that the contract will become null and void on default of payment, it also contains an agreement to pay all dues and assessments until the member should give notice of his wish to withdraw and reference is made in it to the by-laws. The second requires compliance with the stipulations in the application as a condition to its continued validity and effect; the construction of the contract in view of the provision of Section 1 of Article 11 of the by-laws that the "Member shall be held liable to the association for all dues and assessments until such time as he shall have given notice of his desire to withdraw," and the provision of Section 1 of Article 13 of the by-laws that in case of default to pay dues and assessments as required by the trustees "Such membership shall cease and determine at once without notice and all claim be forfeited to the association" seems such that it is optional with defendant to terminate or treat as terminated the relation as member of one who is in default, or to continue him in his relation of membership and charge him with liability to pay dues and assessments until he gives notice of his purpose to withdraw from the association.

In the charge of the trial court the question whether defendant effectually waived the prompt pay-

ment by the member of his dues and assessments was submitted to the jury, with instructions to the effect that if they should find that a certain state of facts was established, and which there was evidence tending to prove, they would be justified in the conclusion that the alleged default in payment was waived and that Baker continued a member of defendant to the time of his death; and no exception was taken to the submission of this question of fact to the jury or to any portion of the charge in that respect; but at the close of the evidence on the part of plaintiff defendant moved for a nonsuit on the ground that the evidence did not entitle plaintiff to a verdict, and at the close of the evidence a like motion was made on the ground that there was not evidence enough to go the jury, and that defendant was "entitled to succeed upon the uncontradicted evidence."

Held, That while these general grounds were broad enough to embrace every reason that existed upon the evidence in favor of such motion, the attention of the court was not necessarily called to the question contended for by defendant's counsel that there is no evidence of waiver by defendant, because it has not the support of estoppel, and it is questionable whether for that reason it can be raised upon the exceptions taken to the denial of the motions, 75 N. Y., 340; 99 id., 61. We are, however, inclined to think that there was sufficient evidence to properly present a question of fact for the

jury in that respect, and to permit the conclusion that defendant had intended to and did, notwithstanding his default in payment, continue Baker a member of the association, and his liability during his life to pay all dues and assessments of and after Jan., 1884, and thereby effectually waived his failure to make prompt payments.

Judgment affirmed.

Opinion by *Bradley, J.; Smith, P.J., and Haight, J.,* concur.

ASSIGNMENT FOR CREDITORS. PARTIES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Edwin A. Bradley et al., v. Ward B. Chamberlain, assignee.

Decided June 18, 1887.

In an action to compel an assignee to account, brought by a creditor in behalf of himself and other creditors, where a creditor appears and files his claim, he becomes a party to the action and is entitled to notice of all subsequent proceedings.

Appeal from order allowing the Mount Morris Bk. to file exceptions to the referee's report.

Action brought by plaintiffs as preferred creditors, in behalf of all creditors, to compel an assignee to account. The case was referred, and the referee proceeded to take testimony and made his report stating the assignee's account. The Mount Morris Bk. had previously filed its claim with the assignee and such claim was

allowed by the referee. It appeared from the report, however, that there were not sufficient funds in the hands of the assignee after paying the preferred creditors to pay the claim of the bank. No notice of filing the report or of application for judgment was given to the bank, but on learning accidentally of such filing and judgment it applied for leave to file exceptions which was granted.

George S. Hastings and Whaley & Caldwell, for appls.

Jacob F. Miller, for resp't.

Held, No error. In an action of this character where a creditor appears and files his claim he makes himself thereby a party to the action and is entitled as such to notice of all subsequent proceedings therewith.

Order affirmed.

Opinion *per curiam.*

RAILROADS. NEGLIGENCE.

N. Y. COURT OF APPEALS.

Lafin, respt., v. The Buffalo & S. W. RR. Co., *applt.*

Decided June 7, 1887.

A railroad company is not bound to use the highest degree of diligence to make its station platforms safe, convenient or useful; it is bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purposes to which it is devoted.

Where an appliance, machine or structure, not obviously dangerous, has been in daily use for years and has uniformly proved adequate, safe and convenient its use may be continued without imputa-

tion of culpable imprudence or carelessness.

The fact that it was dark and the platform not plainly visible, makes it incumbent on the passengers to exercise greater care.

This action was brought to recover damages for injuries sustained by plaintiff in alighting from one of defendant's cars on which she was a passenger. It appeared that the train reached the station at D. in the evening; that as plaintiff left the car to change to another train, in stepping from the car to the station platform she fell between it and the car and sustained injuries of which she complains. The platform was not out of repair. It was two and one-half feet higher than the top of the iron rail, and about three feet above the top of the ground. Between it and the outer line of the car there was a space of eleven inches. At the end of the car there were three steps, the lowest of which was eight inches below the top of the platform, and one foot and seven inches from the side thereof. The second step was two feet and two inches from the side of the platform and about four inches lower than the top thereof. The platform of the car was about four feet above the rails. Plaintiff passed out of the car on to the platform and then to the second step, and without having hold of the iron railing on either side and without looking to see the station platform she stepped toward it and failing to reach it fell and was injured. There was no proof that the station platform was not con-

structed in the ordinary way, or that the space between it and the car was greater than the exigencies of the business required. There was no proof that any accident had ever happened at the station before on account of the construction of the platform, or that there ever had been any complaint in respect to it.

George C. Green, for applt.

W. S. Oliver, for resp't.

Held, That plaintiff was not entitled to recover; that under the circumstances it cannot be properly said that defendant was guilty of carelessness in the construction of the platform and its maintenance. It was not bound so to construct the platform as to make accidents to passengers impossible or to use the highest degree of diligence to make it safe, convenient and useful. It was bound simply to exercise ordinary care in view of the dangers attending its use to make it reasonably adequate for the purpose to which it was devoted. 56 N. Y., 1; 84 id., 455; 98 id., 562.

As a general rule, when an appliance, or machine, or structure not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness.

It appeared that when the accident happened it was dark and that the platform was not plainly visible.

Held, That these facts made it

incumbent upon plaintiff to exercise greater care.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed, and new trial ordered.

Opinion by *Earl, J.* All concur.

REFERENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Augusta G. Genet, *applt.*, v. The D. & H. C. Co., *respt.*

Decided June 18, 1887.

Where an accounting is a necessary part of the relief sought and the true condition of the accounts between the parties is the main issue presented, a reference is proper, although rights under the contract out of which they arose may be also involved.

Appeal from order of reference.

The complaint alleged that plaintiff leased certain lands to defendant for mining purposes; that defendant was to pay a royalty on all coal mined that would pass over a screen of a certain mesh; that defendant made statements of the amount mined on which settlements were made, plaintiff believing them to be true, but that she has learned that they were false statements; that defendant has taken and carried away coal of a smaller size than provided for in the contract, and demands an accounting of the amount mined under the lease and payment of what may be found due, and for judgment for

the smaller coal taken and damages for breach of the contract in recrushing the coal. The answer denied that the statements were false and set up payment, etc.

George C. Genet, for applt.

Frank E. Smith, for respt.

VAN BRUNT, P.J.—An examination of plaintiff's amended complaint shows clearly that an accounting is a necessary part of the relief sought by plaintiff. The ground of complaint seems to be that defendant has not accounted to plaintiff for all coal mined, as required by the agreement between plaintiff and defendant, and that the royalty has not been paid upon all coal to which plaintiff is entitled, and in view of this allegation an accounting is claimed in respect to the coal mined by defendant under the agreement with plaintiff and for judgment for whatever sum may be found due on such accounting. It is true that other relief is demanded, but the gravamen of the action is based on the allegation that royalties have not been paid on all coal mined, and that the accounts rendered by defendant were not true in this respect. It would appear, therefore, that the true condition of the accounts between the parties is the main issue presented, although rights under the contract may be also involved. Under these circumstances we cannot say that there was any error committed in directing a reference.

Order affirmed.

Daniels and Bartlett, JJ., concur.

TITLE. FACTORS.

N. Y. COURT OF APPEALS.

Moors, *applt.*, v. Kidder et al.,
respts.

Decided June 7, 1887.

Where a commercial correspondent advances his own money or credit for the purchase of property and takes the bill of lading in his own name, looking to such property as the reliable means of reimbursement up to the moment when the original principal shall pay the purchase price, he becomes the owner of the property and not its pledgee.

Such agent indorsed the papers in blank and entrusted them to the principal for the purpose of entering the goods at the custom house and warehousing them in the name of the agent. The principal entered them in his own name and pledged them to plaintiff who relied on his representations and the warehouse receipt. *Held*, That plaintiff obtained no title and could not maintain an action to recover the goods.

This action was brought to recover a quantity of shellac. It appeared that in Aug., 1881, K. P. & Co., of Boston, as agents of B. Bros. & Co., of London, under an agreement with one S., issued a letter of credit to B. & Co. of Calcutta by which B. & Co. were authorized to draw on B. Bros. & Co. by bills to the extent of £3,000 sterling, K. P. & Co. as agents promising to accept and pay the bills if accompanied by bills of lading filled up to the order of B. Bros. & Co. and by invoice to their order. S. agreed to provide funds in London to meet the bills at maturity. The agreement also provided that all goods purchased through such credit and the bills of lading therefor should be pledged and hypothecated to B.

Bros. & Co. as collateral security for such payment, to be "held subject to their order on demand with authority to take possession and dispose of the same at their discretion for their security and reimbursement." B. & Co. drew against said letter a bill of exchange for the cost of a quantity of shellac. There was attached thereto the bill of lading for the shellac to the order of B. Bros. & Co. Said firm accepted the bill of exchange and paid it at maturity.

Edmund Randolph Robinson,
for *applt.*

Charles B. Alexander, for
respts.

Held, That B. Bros. & Co. became owners of the shellac and were not pledgees.

Where a commercial correspondent advances his own money or credit for the purchase of property and takes the bill of lading in his own name, looking to such property as the reliable and safe means of reimbursement up to the moment when the original principal shall pay the purchase price, he becomes the owner of the property instead of its pledgee, and his relation to the original mover in the transaction is that of an owner under a contract to sell and deliver when the purchase price is paid. 74 N. Y., 568.

The shellac was brought in the ordinary course of business to the custom house. While in the "General Order" stores B. Bros. indorsed the papers in blank and delivered them to S. on his application for the purpose of enabling him "to enter them at the custom

house and warehouse them for account of" B. Bros. & Co. Instead of doing that S. entered them in the name of his broker and then pledged them to plaintiff as security for a loan, the pledgee trusting to the representations of S. and the warehouse receipt which he had obtained.

Held, That plaintiff could not maintain an action to recover possession of the property as he had never acquired any title to it.

Judgment of General Term, affirming judgment for defendants entered upon an order dismissing the complaint, affirmed.

Opinion by *Finch, J.* All concur, except *Rapallo, Earl* and *Peckham, JJ.*, dissenting.

MUNICIPAL CORPORATION. SEALER OF WEIGHTS AND MEASURES.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

The People ex rel. Linsley L.
Gould v. The City of Rochester.

Decided June, 1887.

The legislature has power to confer on municipal corporations power to provide by ordinances a system, and require its execution within its corporate limits, to enforce conformity to the proper standards of all weights and measures used by dealers in the sale and purchase of merchandise.

The ordinances of the city of Rochester in this respect are reasonable and the authority given by them to the city sealer may be enforced.

Certiorari to the police justice of the city of Rochester to review the proceedings and judgment of

the police court convicting relator of violation of an ordinance of the city, and for the penalty prescribed by it for such violation.

Relator was arrested upon a warrant issued against him and taken before the police court of the city upon the charge that he had violated a city ordinance which provided "§ 3. It shall be the duty of the city sealer and he is hereby authorized to inspect and examine, at least once in every six months hereafter and as much oftener as he thinks proper, all weights and measures used by any corporation, merchant, retailer, trader or dealer * * for weighing or measuring. Such weights and measures shall be inspected at the place or places where the same are kept for use, but if such weights and measures shall be found not conformable to the standards * * they shall be sent by the owner or owners thereof to such place in said city as the sealer shall direct for the purpose of being sealed, within three days after such owner shall be required to do so by said sealer. If any corporation * * * or dealer shall refuse to exhibit any such weights and measures to the said sealer when required to do so by him, or in any manner obstruct such sealer in the performance of the duties hereby imposed upon him * * or shall refuse or neglect to send any such weights or measures for the purpose of being sealed as aforesaid within the time, and to the place aforesaid * * he shall forfeit and pay a penalty of \$10 for each offense."

Relator was a retail grocer in said city, and the particular violation charged against him and which the evidence tended to prove was, that on July 20, 1886, the sealer went to his store for the purpose of examining and sealing his weights and measures and that relator forcibly prevented him from so doing and refused to show to the sealer his weights after he was requested so to do. This ordinance purports to have been passed Nov. 30, 1880, in pursuance of Laws of 1880, Chap. 14, §§ 6, 8, 40, 43 and 78.

Thomas & Desmond, for relator.

Henry J. Sullivan, for deft.

Held, That the regulation of standards of weights and measures and requiring dealers and traders to conform to it and the appointment of officers for that purpose have been matters of legislation in this State from an early day, Laws of 1784, Chap. 25; Laws of 1813, 1 R. L., 376; 1 R. S., 606, and is recognized by the Constitution. It is done for the benefit and protection of the public, and is in the nature of police regulations, and clearly within the legislative power, which power may also be conferred upon municipal corporations to provide by ordinances a system for its execution and to require within their respective limits conformity to the established standards by dealers. 10 Wend., 99; 14 id., 87.

That the ordinance in question was reasonable. The purpose of the statute, the ordinance, and of the creation of the office is the protection of the public by seeing that

the weights and measures by which sales and purchases are made conform to the standard and therefore this matter is placed under the supervision of an officer and power is necessarily vested in him to accomplish the object in view, and to render the system and its purpose effectual it may be quite necessary that he should have this power given him of inspection and examination left to some extent to his judgment; and when the weights and measures are found not to conform to the standards to require that they be brought by the owner to some place where they can be made to conform to such standards.

Judgment affirmed.

Opinion by *Bradley, J.; Smith, P.J.*, and *Haight J.*, concur.

COMMON CARRIERS.

N. Y. COURT OF APPEALS.

Swift et al., respts., v. The Pacific Mail SS. Co. et al., applts.

Decided June 7, 1887.

B., who was vice-president of both defendant companies, whose routes connected, contracted with plaintiffs for the transportation of certain oil from Panama to New York for a single price. Two months after delivery of the oil bills of lading were sent to plaintiffs limiting the liability of each company to its own line. *Held*, That the contract was a joint one, which defendants had power to make, and that in the absence of proof that plaintiffs agreed to accept the bills of lading in place of the contract the latter was not altered or abrogated thereby. Affirming S. C., 21 W. Dig., 400.

This action was brought against the defendants as common carriers

to recover damages for breach of the joint contract for the carriage of whale oil from Panama to New York. The complaint alleged that plaintiffs were copartners and that defendants were corporations organized under the laws of this State; that it was the business of the Panama Railroad Co. to transport freight from Panama and deliver it at Aspinwall to the Pacific Mail SS. Co., whose business it was among other things to transport freight to New York; that the defendants, for a single price named, entered into a joint contract with plaintiffs to carry the oil from Panama to New York; that they entered upon the performance of the contract in Jan., 1873, and about April 26, 1873, delivered a portion of the oil received by them from plaintiffs in New York; that owing to the negligence, delay and improper handling, the oil was greatly damaged and injured and much of it lost by leakage on route from Panama to New York. Each of the defendants answered separately, denying the joint contract and joint liability, setting up that the oil was delivered and carried under a special contract, printed and in writing, setting forth the respective rights and liabilities of the parties, copies of which were delivered to plaintiffs. The answers allege a performance by defendants of the contract, and that neither defendant was liable for losses accruing upon the route of the other, a defect of parties was also pleaded. It appeared that the contract was made with B., who was vice-presi-

dent of both the corporations defendant; that it was the custom of the companies to deduct at Panama the lighterage on through freight and divide the balance equally. Under the contract the oil was to be transported at a rate which was agreed upon and as expeditiously as possible. Two months after the oil was delivered the agent of the defendants at Panama executed bills of lading which were sent to plaintiffs but were not received until after the oil had left Aspinwall. Plaintiffs on receiving them did not discover that they varied from the contract. There was no proof that the plaintiffs consented to accept these bills of lading in place of the contract.

George Hoadley and William G. Choate, for applts.

Austen G. Fox, for respts.

Held, That the contract was a joint one; that it was not altered or abrogated by the bills of lading mailed to plaintiffs by defendants' agent. 45 N. Y., 712; 100 id., 491; 105 U. S., 129.

Where the consignor of goods, although not the general owner, has a lien upon or special interest in the goods, and contracts and pays for their carriage, he may bring an action for a breach of the contract in his own name.

It appeared that some of the seamen were interested in the oil.

Held, That this was not sufficient to establish that they were partners or joint owners with the plaintiffs and did not make them necessary parties to the action.

The Panama RR. Co. was or-

ganized to construct, maintain and operate a railroad from Panama to Aspinwall, and the Pacific Mail SS. Co. to navigate steamships on the Pacific and Atlantic Oceans. It was not disputed that each company could receive freight and contract to carry it to the terminus of the other company.

Held, That a carrying corporation over a portion of continuous line of transportation could contract to carry beyond the terminus of its route, 19 Wend., 534; 53 N. Y., 156; 45 id., 524; 54 id., 500; that defendants could make a joint contract of carriage and could even become partners in the transportation business between Panama and New York. 132 Mass., 423; 139 id., 308; 99 id., 220; 42 Ark., 465; 104 U. S., 146; 49 N. H., 9; Hutchinson on Carriers, 160.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by *Earl, J.* All concur.

FRAUD. BANKERS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The Rochester Printing Company, *applt.*, v. Leslie C. Loomis et al., *respts.*

Decided June, 1887.

One who receives a draft from a fraudulent holder on account of a precedent debt is not a *bona fide* holder or owner for value, and such draft is subject to any defense in his hands which could have been made to it in the hands of the fraudulent holder.

The relation between a banker and his cus-

tomers is in some degree confidential, and it must be assumed that the banker understands that they make deposits with him upon the faith and reliance that he is financially able to pay their drafts upon him to the amount of their deposits; and the relations he assumes, in view of the nature of his business, is in practical effect a representation on his part that he is able to do so; and if he knows or has reason to believe that he is in a condition of irretrievable insolvency, so that he could not meet his engagements, when he takes the funds of his customers, deposited to be placed to their credit, the transaction may involve an implied representation or concealment which characterizes it as fraudulent on the part of the banker.

In this action the defense of fraud did not necessarily depend upon representations made by the banker to defendants in respect to his financial ability, but fraud might be implied from the relation he assumed by means of which an invitation was extended alike to them and others to open an account with him.

In a defense for fraud deception is necessary, but in view of the evidence and the charge as made, the court was not required to further charge specifically that the defendants must have been deceived. A man cannot honestly carry on the banking business and relieve himself of the imputation of inexcusable deception by reliance upon a mere promise of another to carry him, without some security for the performance of the promise. His expectation, to afford an excuse, must be based on some right of property, or in some legal duty furnishing, in a reasonable degree, the right to suppose his wants will be supplied, or that his demands could be enforced.

Appeal from judgment entered upon verdict for defendants at Circuit, and from order denying motion for new trial, made upon a case and exceptions.

Action upon a draft drawn by defendants in their firm name of Loomis & Woodworth, upon E. S. Tatem, of Philadelphia, of the

date of Dec. 19, 1882, for \$983,63, which it is alleged was at its date by them delivered to William C. Moore, by him indorsed and delivered to Barnard, cashier, or order, and by the latter indorsed and transferred to plaintiff, and that it was protested for non-acceptance.

The defense alleged is that the draft was obtained by Moore of defendants by means of false and fraudulent representations and concealment by him respecting his financial condition; and that plaintiff is not a *bona fide* owner or holder of the draft for value; and the allegations of the transfer to and title of plaintiff are put in issue. Moore had been doing business as a private banker at Victor, N. Y., for about twelve years. Defendants did business with him as such. They made deposits and drew checks upon his bank. This draft was delivered to him about 3.45 o'clock P. M., of Dec. 19, and at 4.00 o'clock the same day his banking office was finally closed. Moore left Victor, and the next day made an assignment for the benefit of creditors, and the drawee was by defendants advised not to accept or to pay the draft. The amount of the draft, less the charges for exchange, was by Moore placed to the credit of defendants in their account with him as banker, and it was the same evening mailed by him to the City Bank of Rochester, and before it had reached there the City Bank had finally closed its doors, and ceased business. The draft however was placed to the credit of Moore on its books as of

date Dec. 19, against whom in his account there remained a balance of \$4,000, after such credit. At the time Moore received this draft he was and had been for considerable time utterly insolvent, and as the evidence tended to show hopelessly so to his knowledge. His liabilities to depositors were \$30,000 and all together about \$100,000, and his assets about \$10,000. He had been largely dependent on the City Bank of Rochester for currency to support his banking operations, with the president of which he had a verbal understanding for aid in that respect, and when that bank failed he was unable to proceed. Plaintiff having a balance to its credit of \$3,000, in the City Bank, was paid by it the morning after its failure such balance in securities, among which was this draft.

John Van Voorhis, for applt.

W. H. Adams, for respts.

Held, That the City Bank was not, nor was plaintiff a *bona fide* owner or holder for value of the draft; by each it was received on account of a precedent debt, and it was subject to any defense which defendants could have made to it in the hands of Moore, and that whatever may be the right to it or its proceeds between the receiver of the City Bank and plaintiff, 1 R. S., 591, §§ 8, 9., it is not available as a defense in this action.

The trial court submitted to the jury the single question of fact whether or not Moore acted in good faith in the transaction of receiving the draft from defendants, and held that if he did not plain-

tiff was not entitled to recover. In other words, whether it was an honest transaction on the part of Moore in view of his financial condition and his understanding of it for him to take the draft from defendants and assume the responsibility to them which he did by placing its amount to their credit on his books as a banker. Plaintiff's counsel took exception to the charge as so made, and to the refusal of the court to submit several propositions to the jury as requests, amongst which were the requests to charge, that to establish the defense defendants must show that Moore made false representations to them with intent to deceive defendants and by that means procured the draft; also that the answer of defendants could not be sustained unless the jury should find that they were in fact deceived; also that representations made to the world were not sufficient, that they must be to defendants. The court had charged on that subject substantially that a banker by proclaiming himself as such, and ready to receive deposits of his customers, holds himself out as a man of sufficient means to meet the obligations he in that manner assumes. And if his condition was such, and he knew it, when he received a deposit in the course of business with his customers, that he was likely to be incapable of meeting the demand for it, he was bound to disclose that situation before he received the deposit; that one assuming that relation cannot be permitted to take the money of his

customers when he knows that he is unable to repay and likely to be compelled to suspend; that mere insolvency does not necessarily render the receipt of money by a banker fraudulent; but insolvency which is hopeless and irremediable, and renders him liable to shut his doors at any moment makes it improper for him to continue the business of taking deposits without notice to his customers of his situation; that the fact to be found is whether this deposit was received by Moore in good faith or under circumstances which rendered it honest on his part to receive it, or whether it was dishonest and fraudulent toward his customers, defendants, to receive it; that if a man is doing banking business fraudulently all the time it is not necessary that he should entertain a particular fraudulent intent in each particular instance in which he receives deposits; that if this transaction was fraudulent on the part of Moore the defense is established, and if it was honest on his part plaintiff is entitled to recover.

Held, That the charge as made covered the ground and stated fairly the proposition of fact which was for the consideration of the jury, and to be determined by them to reach a result. The relation between a banker and his customers is in some degree confidential, and he, it must be assumed, understands that they make deposits with him upon the faith and reliance that he is financially able to pay their drafts upon him for an amount equal to their deposits;

and the relations he assumes, in view of the nature of his business as such banker is in practical effect a representation on his part that he is able to do so. And if he is in an irretrievable condition of insolvency so that he knows, or has reason to suppose, that he cannot meet the engagements he assumes, when he takes the funds of his customers desposited to be placed to their credit, the transaction may involve an implied representation or concealment which characterizes it as fraudulent on the part of the banker. 67 N. Y., 598; 99 id., 131.

That the defense did not necessarily depend upon the representations expressly made to defendants by Moore in respect to his financial condition and ability, but might be implied from the relation he assumed as a banker, by means of which invitation was extended alike to them and others to open an account and deposit their moneys with him.

That deception was necessary to be found and unless defendants were deceived they had no defense, but there is no evidence that they had any knowledge or information when they made the deposit that Moore was insolvent, or was not responsible for all his obligations, and therefore, in view of the charge as made, the court was not required to further specify or charge that they must have been in fact deceived to constitute a defense.

The court was also requested to charge that if the jury believed the testimony of Moore that he intended and expected to go on in

business at the time he took the draft, no matter how poor ground he had for that expectation, if he did so intend, honestly, the defense could not be maintained; also if his failure was caused by the failure of the City Bank, and he did not know until 7.30 P.M. of Dec. 19 that he would be obliged to fail, and had no intention of failing up to that time, the defense cannot be sustained; also that if he honestly believed that Upton (as he had promised) was able and would carry him, although Moore was insolvent and knew it, if he relied on that belief, he was guilty of no fraud. The court refused so to charge and exceptions were duly taken.

Held, No error. That the expectation and intention of Moore founded wholly upon the promise of Upton resting on no legal obligation to perform it may have been matter for the consideration of the jury submitted to them, but was not necessarily sufficient to relieve Moore from the imputation of inexcusable deception of his creditors. A man cannot honestly carry on banking business upon a mere promise of another to carry him without some security for the performance of the promise. Good faith toward his customers required something more for its support than a mere expectation that funds would be furnished to enable him to meet his obligations to his depositors. The expectation must be based on some right of property, or in some legal duty furnishing in a reasonable degree the right to suppose his wants

would be supplied or that his demands could in some manner be enforced.

It appeared that at the time of the delivery of the draft to Moore, defendants presented their check for \$365, for payment, and it was paid by him, and that defendants' account there exclusive of the draft was \$180.56 less than the amount of the check, and the court was requested to charge, that if Moore paid on defendants' check on the strength of the draft any sum of money, at the time of its discount by him, the defense could not be sustained, because it does not appear that the money was returned or its return offered; also that Moore was the owner of the draft to the extent of the moneys he had paid defendants, and that it was good at least for that amount in the hands of any person to whom it passed.

Held, That the right to restitution was to Moore only, founded on rescission of contract, and that right passed to his assignee, in the event that the delivery of the draft and credit for its amount are repudiated, and did not pass by the transfer made by Moore of the draft. That defense if effectual goes to the draft entire, and plaintiff in any event is not entitled to the amount advanced by Moore, and is not in a position to assert the failure to restore, or of an offer to restore that amount as essential to the defense.

Judgment and order affirmed.

Opinion by *Bradley, J.; Smith, P.J.*, concurs; *Haight, J.*, dissents.

PARTNERSHIP.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Frederick Vajen, *applt.*, v. Magdalena Birngruber, *respt.*

Decided June 18, 1887.

Plaintiff and defendant entered into an agreement to enter into business together, each contributing capital, and that when defendant should be repaid the excess of capital contributed by her the net profits should be equally divided and that each should bear half the losses, and thereupon began to do business. *Held*, That this constituted a partnership in *presenti*, and not one to commence when defendant's excess was repaid.

Appeal from judgment dismissing complaint, entered on report of referee.

Action to dissolve a co-partnership. The answer denied the partnership. The referee found "that prior to Jan., 1885, plaintiff and defendant made an agreement that they should enter into business together, each one contributing capital, and that when defendant should have been repaid out of the profits of the business the sum which she should contribute in excess of the amount of capital contributed by plaintiff the net profits thereafter remaining should be equally divided between plaintiff and defendant, and that each party should bear half the losses and expenses, and thereupon they began to do business." "That plaintiff contributed as capital the sum of \$148 and defendant contributed \$1,000." As conclusions of law he found that no partnership existed between the parties, and reported in favor of dismissal,

on which judgment was entered.

Solon P. Rothschild, for applt.

Kaufman & Sanders, for respt.

Held, That the practice pursued in the entry of judgment was irregular, but as no objection on that ground has been taken such irregularity will not be considered except so far as to state that the action being for equitable relief the final judgment should have been a decree of the court settled by the court and entered upon its direction, the referee not having reported the form of decree to be entered.

That the conclusion of law of the referee is clearly at variance with and contrary to his findings of fact. There is no element wanting to establish a complete relation of partnership. It might be true that under the agreement plaintiff might not have been immediately entitled to receive any part of the profits because of the inequality of contribution in capital, but he was chargeable with losses and had all the rights and obligations of a partner. The referee finds that after this agreement between the parties to become partners they began to do business and that each contributed capital to this business. If they began to do business it is evident that they did such business as such partners and not otherwise.

The claim that plaintiff was not to become a partner until defendant's excess of capital was repaid out of the profits can find no support from this finding, and is directly opposed both to its terms and spirit.

Judgment reversed and new trial ordered, costs to appellant to abide event.

Opinion by *Van Brunt, P.J.*; *Brady* and *Daniels, JJ.*, concur.

RELIGIOUS CORPORATIONS. DEED.

N. Y. COURT OF APPEALS.

In re application of the First Presbyterian Society of Buffalo for leave to sell real estate.

Decided June 21, 1887.

An absolute deed of land to a religious corporation without conditions or restrictions creates no trust beyond the general duty which requires such corporation to use its property for the purposes contemplated in its creation; the corporation acquires an absolute fee which it can transmit to a vendee with the judicial consent, and when that occurs the proceeds take the place of the land.

The registry only becomes of importance when it excludes a lawful voter or admits an unlawful one.

On petition of a majority of the members of the petitioner the Supreme Court made an order consenting to a sale of its real estate, and directing the proceeds to be applied to provide such other place of worship as the society shall direct. It was claimed that the property cannot be sold because of a trust imposed upon it. The deed to the corporation is absolute and without condition or reservation.

J. M. Humphrey, for applt.

Spencer Clinton, for respt.

Held, That the deed created no trust beyond that general duty which the law puts upon a corporation of using its property for the

purposes contemplated in its creation. That sort of trust is not one which fastens upon the land and inheres in the title, but is founded solely upon the corporate character of the grantee, and so justifies the control given by the statute to the courts. The title of the society is an absolute fee which it can transmit to a vendee with the judicial consent and approval. When that occurs the proceeds take the place of the land which the court by a suitable direction devotes to the proper uses and purposes which the corporation was framed to subserve, and to accomplish which its property was bestowed.

It was also claimed that the acts of 1875 and 1876 have so far changed the then existing law as to prevent a transfer of the property except in accordance with the rules and usages of the denomination, and that those rules and usages require the precedent approval of the presbytery. It appeared that the presbytery had consented to proceeding with the sale provided a majority of the congregation should so decide in public meeting assembled, and that the steps in that direction should be taken "with care and tenderness." This was done.

Held, Untenable; that no rule or usage of the Presbyterian denomination had been violated.

It was also claimed that the vote was illegal for want of a proper register. It appeared that full and formal notice of the meeting and its purpose was given; that everyone entitled to vote had an oppor-

tunity to do so and that but one vote offered was refused, and there was no proof that such vote ought to have been received or that any of the votes received should have been rejected.

Held, That the claim was untenable; that in such a case the mode and manner of making the registry is of little importance, and it only becomes so when it excludes a lawful vote and admits an unlawful one.

Also held, That the courts below having exercised their discretion upon the facts presented, this court cannot interfere with their conclusion.

Order of General Term, affirming order of Special Term granting petition, affirmed.

Opinion by *Finch, J.* All concur.

DEPOSITIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Fleming S. Phillips, *applt.*, v. The Germania Mills, *respt.*

Decided June 18, 1887.

Where an order for examination of a defendant before trial and production of books has been set aside on the ground that an offer to allow an inspection of books has been made, and permission to inspect has been afterward denied, it is too late to renew such offer after a second order of examination has been obtained.

Appeal from order vacating order for examination of S., treasurer of defendant.

Plaintiff was employed by defendant under a written contract by which he was to receive \$3,000 per year salary and a percentage

on net profits guaranteed to be at least \$3,000 per year. He received only \$6,000, and brought this action for breach of contract and failure to pay him the profits to which he was entitled. He obtained an order to examine S. and for the production of the books of defendant to enable him to prepare his complaint. This order was vacated on the ground that it would be a doubtful exercise of discretion to make an order requiring a foreign corporation to bring its books from its principal office into this State for inspection, especially after it had offered to allow the inspection to be made in the foreign State. Subsequently defendant refused a request to inspect in the foreign State, and plaintiff procured the order for the examination of S., which was vacated by the order appealed from "provided defendant stipulates to allow an examination of the books" in the foreign State.

Larned & Curtis, for applt.

Joseph A. Shoudy, for respt.

Held, Error. That after this order for examination was granted, in view of the previous history of the case, it was too late to renew the offer to examine the books. By a refusal unjustified under the circumstances of this case plaintiff was put to the trouble of his motion, and defendant should not then be allowed to escape from such examination by agreeing to do that which it never should have refused.

The objection that S. is not directed to be examined as an officer of defendant is not well

taken. The affidavits show that his examination is sought as an officer of defendant, and the section of the Code simply requires the order to state the name of the officer whose examination is desired.

Order reversed, with \$10 costs and disbursements.

Opinion by *Van Brunt, P.J.*; *Daniels* and *Bartlett, JJ.*, concur.

CORPORATIONS. TRUSTEES. PRACTICE.

N. Y. COURT OF APPEALS.

Brinckerhoff et al., applts., v Bostwick et al., respts.

Decided May 13, 1887.

A court of equity has jurisdiction of an action to compel the directors of a bank to account for the performance of their duties, where it is alleged that by their negligence and misconduct losses have been incurred by which the bank is rendered insolvent, although issues may be framed to be tried by a jury.

This action was brought by B. in his own behalf as a stockholder of the Fishkill National Bank, and for other stockholders against the directors of said bank to call them to account as trustees for the manner in which they have discharged their trust, it being alleged in the complaint that certain losses met with by the bank were caused by the carelessness, negligence and misconduct of defendants, and that thereby the funds of the bank had been stolen and wasted and the institution rendered insolvent. An order was made at the Circuit striking the case from the calendar and directing it to be tried as an equity action by the court without

a jury, and allowing defendants to apply to the court for an order framing issues to be tried by a jury.

O. D. M. Baker, for applts.

Milton A. Fowler, for respts.

Held, No error; that the action as a whole was such as a court of equity would have jurisdiction of, 99 N. Y., 185, although issues might be framed in it to be tried by a jury.

Hun v. Cary, 82 N. Y., 65; *Bradley v. Aldrich*, 40 id., 504; *Davison v. Associates of Jersey Co.*, 71 id., 333, distinguished.

Order of General Term, reversing order of Special Term, reversed, and order of Special Term affirmed.

Opinion by *Peckham, J.* All concur.

RAILWAY. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Lawrence O'Laughlin, *respt.*, v. The N. Y. C. & H. R. RR. Co., *applt.*

Decided June, 1887.

Plaintiff, an employee of defendant, was injured by a collision with a disabled engine which was being taken to the shop for repairs, running wild in charge of an engineer inexperienced in the management of engines in that condition, and who was unable to stop it in time. *Held*, That it was for the jury to determine whether the engineer was negligent and whether his negligence alone caused the injury, and that a motion for nonsuit was properly denied.

Appeal from Special Term order denying defendant's motion for a new trial on the minutes.

Action to recover damages for a

personal injury to plaintiff alleged to have been caused by defendant's negligence while plaintiff was in its employ as a fireman on train No. 23. The accident occurred about 10:45 P. M. Train No. 23 was a regular passenger train, running west on the Auburn branch of defendant's road, and was due at Shortsville at 10:47 schedule time. It left the station next east four minutes late, and had nearly made up its time, and when within a short distance of Shortsville it collided with an engine of defendant, running easterly, termed a "wildcat" engine, or one having no schedule time, and the injury complained of ensued. The "wildcat" was an engine with tender attached which had that day become disabled and was being taken to Syracuse for repairs in charge of an engineer, W., and a fireman. The disability of the "wildcat" engine was such that only one pair of its driving wheels was connected with the cylinder, the disconnected pair acting merely as truck wheels, thus greatly increasing the difficulty of stopping the engine quickly while in rapid motion, by reason of its loss of power to grip the track. W. was ordered from the office of defendant's superintendent at Rochester to take the disabled engine from Canandaigua to a railroad junction east of Shortsville, and he accordingly left Canandaigua at 10:33 P. M. Shortsville is six miles east of Canandaigua. About midway between them is Chapinville. The track is single, with switches and side tracks at each station. At Shorts-

ville are two switches west of the station, and one east of it at the east end of the side track. W. left Canandaigua intending to pass Chapinville and meet No. 23 at Shortsville. Accordingly, he ran to Shortsville without stopping, going part of the way at the rate of twenty-four miles per hour. He passed the west switches, intending to run to the east switch and back onto the siding. From the west switch to the place of collision there was a descending grade. Near the west switch W. shut off steam, and as he approached the depot he looked at his watch and saw that the time was 10:45, and then he reversed his engine. Seeing that the engine did not slow up and apparently had no power to take hold of the track, he gave her a little steam in the back motion, and applied the brakes and sand, but could not stop her, and soon the headlight or No. 23 appeared and the collision occurred, his engine being then in motion. W. was thirty-one years old at the time of the accident, had been in defendant's employ several years, part of the time as a fireman and at two different periods of about six months each had served as an extra engineer in charge of freight trains, but never as a regular engineer; had been over the Auburn road about twenty-four times in all, in his service as an engineer, the last time about a month before the accident; had never inspected the switches or side tracks at Shortsville or Chapinville so as to learn their exact location, and knew

nothing on that subject except as he had noticed when he passed over them and had been told by others; had no experience in running an engine disabled as this was, and had never observed the effect of such disability upon the holding power of an engine or the ability of those in charge of it to stop it; was examined when promoted to the position of engineer, but not upon that subject. The court denied a motion for nonsuit, and submitted it to the jury to say whether W. in passing the west switch and descending the grade at Shortsville with the intent to take the east switch was negligent, in the circumstances, and if so, whether such negligence was the sole cause of the accident; and he further instructed them that if they should so find, plaintiff was not entitled to recover, defendant not being liable for an injury occasioned to plaintiff by the negligence of his co-employee. On the other hand, notwithstanding they should find W. negligent, if they should also find that he would have avoided the accident if he had been an engineer of such competence, skill and experience as was required for the occasion, and had had an engine in such competent condition as to have responded to the demands which he then reasonably made upon it to prevent and escape the accident which followed, plaintiff is entitled to recover.

Harris & Harris, for applt.

J. & Q. Van Voorhis, for respt.

Held, That the questions submitted were presented by the evi-

dence, and the instructions given in connection with them as to the law were proper. 91 N. Y., 332.

It was for the jury to say whether anything was omitted which might reasonably have been done by defendant to prevent the collision, and whether the injury was attributable to negligence on the part of the master.

The court charged that if the injury could be attributed to the negligence of defendant, however slight, defendant is liable, notwithstanding W. may have been negligent.

Held, No error. 92 N. Y., 639; 95 id., 546.

Also, it was for the jury to say whether the engine was in such a condition that, in view of all the circumstances, the sending it out was negligent, even assuming that W. was competent.

Order affirmed.

Opinion by *Smith, P.J.*; *Haight* and *Bradley, J.J.*, concur.

FERRIES.

N. Y. COURT OF APPEALS.

The Mayor, etc., of N. Y., *respt.*, v. The New Jersey Steamboat Co., *applt.*

Decided June 7, 1887.

Defendant's ferry, so far as it carries passengers between the city and the points at which it stops in Staten Island and New Jersey, infringes upon the franchises of the city, and to that extent defendant may be restrained from maintaining it.

This action was brought to restrain defendant from infringing upon the ferry franchises of the city of N. Y. between it and Staten

Island. It appeared that the city had established a ferry between the foot of Whitehall street and various points on Staten Island. Defendant had also established a ferry which ran from a private pier about seven-eighths of a mile distant from the foot of Whitehall street, and thence to a point in New Jersey, and from thence to two points on Staten Island, and thence to a point in New Jersey, when it returned, stopping at the same places, to the same pier.

Noah Davis, James McNamee and *Adolf L. Pincoffs*, for *appls.*

James C. Carter and *W. W. Mcfarland*, for *respt.*

Held, That defendant should be restrained so far as its ferry infringed upon the franchises of the city; that the business of defendant did not lose its character as a ferry business because its boats stopped both upon the shores of New Jersey and Staten Island; that in carrying passengers from one place on the New Jersey shore or the Staten Island shore to other places on the same shore, it was simply doing the business of a common carrier, as its boats did not pass over intervening waters, but as in going from the city its boats could leave passengers from the city at each of the places at which it stopped and in returning could take passengers at each of the places and carry them to the city, if it did this it would be engaged in a ferry business.

Also held, That as the city owns all the franchises between it and Staten Island it could discharge

its duty to the public by establishing one ferry with as many termini on Staten Island as there were landing places; it was not bound to have more than one terminus in the city, it not having been shown or claimed that more than one was needed there for the accommodation of the public.

Ferries may be established when the intervening waters are not wide and can be traversed at regular and brief intervals by boats adapted to a ferry business.

Judgment of General Term, affirming judgment for plaintiff, modified so as to restrain defendant from maintaining and operating a ferry between the city of New York and Staten Island, and as modified affirmed.

Opinion by *Earl, J.* All concur.

WILLS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

In re probate will of Mary Theresa Hatten.

Decided June 18, 1887.

Unless a testator knows the contents of the alleged will at the time of its attempted execution no valid execution can be made; subsequent knowledge is not sufficient to validate it.

Evidence insufficient to show such knowledge.

Appeal from decree of surrogate admitting will to probate.

The surrogate found that testatrix was of sound disposing mind and free from restraint, and that no fraud or undue influence was used; that she never saw the paper propounded as her will until

it was presented to her for execution. There was no proof that it was prepared in pursuance of her instructions or that it was read to her. It was handed to her in the presence of the witnesses while she was on her sick bed, and she sat up in bed when she signed it and after signing laid down again. The witnesses testified that she had the will just long enough to sign it; that she looked at it as she signed, but could not say that she read it. It appeared that she was little accustomed to reading or writing.

Roger A. Pryor, for contestants.

William H. Arnoux, for exrs.

Held, That there being no proof of instructions, no proof that decedent ever saw or had possession of the will before the time of execution, the fact that it was produced by one of the parties interested in its execution and that she only had possession of the paper long enough to sign it, that it was not read to her and that none of the witnesses prove that she read it herself, leads to the conclusion that there is an utter want of evidence tending to show that decedent ever had an opportunity to become acquainted with the contents of the will in question before execution. There is evidence, perhaps, that she read the alleged will afterward, but unless she knew the contents of the paper at the time of the attempted execution no valid execution could be made.

Decree reversed and a new trial ordered before a jury in the Court of Common Pleas.

Opinion by *Van Brunt, P.J.*; *Daniels* and *Bartlett, JJ.*, concur.

SPECIFIC PERFORMANCE. COUNTERCLAIM.

N. Y. COURT OF APPEALS.

*Moser, exrx., applt., v. Coch-
rane, respt.*

Decided Oct. 4, 1887.

To entitle a vendee to be relieved from a contract for the purchase of land he is bound to show that the title was not such as he was bound to accept.

The question as to whether a title is marketable is for the court to determine; the opinion of conveyancers is immaterial.

In an action by the vendee to recover money paid on the contract the vendor may plead proper facts and pray specific performance as a counterclaim, and on proving it is entitled to the affirmative judgment demanded.

Affirming S. C., 21 W. Dig., 545.

This action was brought to recover \$1,000 paid by plaintiff on a contract for the purchase of real estate. It appeared that plaintiff agreed to purchase certain real estate of defendant for \$20,500, payable \$1,000 down, and the residue in instalments after and subsequent to the delivery of the deed, which it was agreed should be made June 10, 1882. The \$1,000 was paid and in due time the deed tendered, but plaintiff refused to receive it and brought this action Aug. 11, 1882, to recover back the money paid, claiming that the property was part of the estate of C., who died intestate on or about Dec. 20, 1880, and as the administration of the estate had not been closed and three years had not elapsed since

letters of administration were granted, plaintiff would have to take the property subject to the debts of the intestate, if there were any after the personal estate was exhausted. That four years have not elapsed since the intestate's death, and if within four years thereafter a will should be found it would govern the disposition of his property and the conveyance to plaintiff be void. The answer averred, among other things, that all the intestate's debts had been paid by his administrator, who declared himself ready and willing to carry out the contract, and prayed that plaintiff be required to specifically perform it. Upon the trial all the facts were found in favor of the defendant, the judge also finding "that at the time fixed by the agreement for the delivery of the deed all the debts of the deceased had been paid." Judgment was ordered for the defendant according to the prayer of the answer.

Sol. Kohn, for applt.

James R. Marvin, for respt.

Held, No error; that to entitle plaintiff to relief he was bound to show that defendant's title was not such as he was bound to accept, and to carry out the theory of the complaint that the personal estate of defendant's intestate was insufficient to pay his debts. 7 Paige, 550; 2 Bosw., 161.

Plaintiff offered evidence of his inability to procure a loan upon the property, and that the reasons assigned by the lawyer to whom he applied were those stated in the complaint as objections to the

title. There was evidence also offered to the effect that members of the legal profession familiar with such questions regarded a title derived from an heir within the periods named in the complaint non-marketable. This testimony was all excluded.

Held, No error; that if the facts proved justified the inquiry the question was for the court to answer, the opinion of conveyancers being immaterial. Sugden on Vendors, 174.

Also held, That defendant's counterclaim having arisen out of the transactions set forth in the complaint, and without which plaintiff could have had no standing as a litigant, the case is within the Code, §§ 501, 502, and defendant having established the counterclaim was entitled to the affirmative judgment demanded in the answer. 82 N. Y., 271.

Judgment of General Term, affirming judgment dismissing complaint and compelling specific performance of contract, affirmed.

Opinion by *Danforth, J.* All concur.

ASSAULT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People, *respts.*, v. Alfred L. Burgess, *applt.*

Decided June 18, 1887.

A conviction of assault in the first degree in administering poison cannot be sustained where the evidence is not sufficient to show that the life of the person to whom it was administered was endangered.

Appeal from judgment of General Sessions convicting defendant of assault in the first degree.

The indictment stated that defendant with one M. did wilfully and feloniously make an assault on one Mary Burgess, and administer and cause to be administered to and taken by her a certain poison with intent to kill her, by means whereof the life of said Mary Burgess was then and there endangered.

There was evidence sufficient to show that defendant administered and caused to be administered the poison to his wife with intent to kill, but there was no sufficient evidence to show that by such administration of the poison the life of said Mary Burgess was endangered.

A. Suydam, for *applt.*

Mackenzie Semple, for *respts.*

Held, Error. It would seem that the administration of poison with the intent to kill should be entirely sufficient, as it was under the statutes, to justify such a conviction, although it may have been administered in consequence of ignorance in such large or small doses as not actually to have endangered life. Under the Penal Code, however, it is necessary that the proof should establish the fact that by the administration of the poison life was endangered. This it is almost impossible to prove. The poison is always administered secretly. The fact of the dangerous character of the dose can only be judged by its effects, and if death does not ensue the proof on this point is necessarily exceedingly

difficult to procure. The intention that the administration should be dangerous is involved in the proof of the intent to kill; and because of unskillful administration so that death does not ensue the character of the crime does not in any degree seem to be lessened. The offense is certainly as great as an assault by means of any deadly weapon with intent to kill. Under the law as it stands, however, the evidence in the case at bar was entirely insufficient to show that by the administration of the poison in question the life of Mrs. Burgess was endangered, and consequently the conviction cannot stand.

Judgment reversed.

Opinion by *Van Brunt, P.J.*; *Daniels* and *Brady, JJ.*, concur.

NEGLIGENCE.

N. Y. COURT OF APPEALS.

Woodard, admrx., *respt.*, v. The N. Y., L. E. & W. RR. Co., *applt.*

Decided Oct. 4, 1887.

On a bright, clear day deceased, who was familiar with the crossing, started to cross the tracks with one P., carrying a basket of coal, and was struck by a car being switched and moving by its own momentum. It appeared that the car could have been seen if deceased had looked. *Held*, That he was guilty of contributory negligence.

To be an excuse, the object which diverts the attention must be something which can justify, consistently with prudence, the withdrawal of attention from the near and imminent danger.

Reversing S. C., 20 W. Dig., 435.

• Action to recover damages for the killing of W., plaintiff's inter-

tate, through the alleged negligence of defendant. It appeared that W. was killed on a street in the village of Hornellsville which was crossed by six of defendant's tracks by being struck by one of defendant's cars, the line of the street and of the rails making quite an acute angle as they approach each other from the north and west. W. was employed at a coal yard which fronted on said street and ran back to the premises of the railroad. While so employed he became entirely familiar with the crossing, and with the use of a switch upon which was placed the coal destined for delivery in Hornellsville, and the cars containing it were habitually shunted down that switch and across the switch to the place of unloading. The switch was the first track W. came to in crossing the street. On approaching the crossing from the yard where he was employed W. had on his right a vacant lot bounded by a high fence toward the rails and adjoining that a building which obstructed a view of the track west of the crossing. On reaching the southeast corner of the building, which was 31½ feet from the intersection of the street with the rails, the switch could be seen to the west a distance of 57 feet. When within 10 feet of the track it could be seen a distance of 137 feet, and when within two feet of the track the switch could be seen for its whole length to the west and a portion of the main track besides. About the middle of a bright, clear day, W., with one P.,

approached the crossing carrying a basket of coal brought from the yard where he was employed, and, in attempting to cross the switch track, when near the further rail, he was struck by a coal car, which had been kicked down from the west and was moving by its own momentum, at a rate not exceeding four miles an hour.

E. C. Sprague, for applt.

E. Countryman, for resp't.

Held, That plaintiff should have been nonsuited, there being no question for the jury to pass upon, as it appears from the facts that W. either looked and seeing the car coming undertook to cross in front of it, or did not look when it was his duty to do so, but went blindly upon the track, taking the chances of what might occur, and was thus guilty of contributory negligence.

It was claimed that W.'s attention having been diverted by the passage of a train to the west on one of the tracks south of the switch and by the movement of some coal dumps on another, he was excused from looking to see whether anything was approaching on the switch track.

Held, Untenable; that to be an excuse the object which diverts the attention, as was claimed, must be something which can justify, consistently with prudence, the withdrawal of attention from the near and imminent danger, otherwise it is mere needless curiosity, which itself amounts to inattention.

Greany v. RR., 101 N. Y., 419, distinguished.

Judgment of General Term, affirming judgment on verdict, reversed, and new trial granted.

Opinion by *Finch, J.*; *Rapallo, Earl* and *Peckham, JJ.*, concur; *Danforth, J.*, reads for affirmance; *Ruger, Ch. J.*, and *Andrews, J.*, concur.

BILL OF PARTICULARS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Union Hardware Co., *resp't.*, v. Albert Flagler et al., *impl'd.*, *appls.*

Decided May 13, 1887.

A copy account authorized by § 531 should contain both the debits and credits.

Appeal from order denying motion for a further account.

Action for a balance of account. The complaint alleged the delivery of goods to defendant for sale on plaintiff's account; that a part was returned and a portion of the balance accounted for, leaving a balance of \$1002.81 due.

Defendants demanded a copy of the account, and plaintiff furnished a copy of the debit side only. Defendants demanded a further account, specifying the items alleged to have been returned, those alleged to have been sold by defendants and those accounted for. The demand not being complied with, this motion was made and denied.

A. R. Robertson, for applts.

Larned & Curtis, for resp't.

Held, Error. An account is defined to be a detailed statement of

the mutual demands in the nature of debit and credit between the parties arising out of contracts or some fiduciary relation. Bouv. Law Dict. and cases cited. The account furnished by plaintiff is not a detailed statement such as is contemplated by the definition just given, but is a statement of the debit side of the account only. It does not show that the balance asserted to be due is correct even on plaintiff's theory. If plaintiff had given the debits and credits the accuracy of the balance stated would at once appear from their account, however it may be contested by defendants in any subsequent investigation.

Order reversed and plaintiff required to furnish in addition all items of credit which affect the account in any way and all other items necessary to make the account a perfect account of the transactions between the parties, costs to abide event.

Opinion *per curiam*.

REARGUMENT. PRACTICE.

N. Y. COURT OF APPEALS.

Anderson, *respt.*, v. The Continental Ins. Co., *applt.*

Decided June 28, 1887.

The papers on a motion for reargument should be sufficient to enable the court to determine whether its decision requires correction in any respect.

This was a motion for a reargument, on the ground that the dissenting opinion of Davis, J., at General Term, upon which a judg-

ment for plaintiff was reversed and a new trial ordered, contained expressions in said opinion which may embarrass plaintiff on the new trial ordered, and that Davis, J., overlooked or misapprehended certain facts. Neither a copy of the opinion by Davis, J., nor a copy of the case was presented on this motion.

Benjamin H. Bristow and *Edward Mitchell*, for motion.

Thomas H. Hubbard, opposed.

Held, That the motion should be denied; that the motion papers should be sufficient to enable the court to determine whether its decision requires correction in any respect; that the papers presented do not contain any reason for changing the decision of this court, nor on the facts appearing at the trial could the plaintiff recover.

Motion denied.

Mem. *per curiam*. All concur.

WILLS. LEGATEES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

William Hovey, individually and as exr., *applt.*, v. Melinda R. Purdy et al., *respts.*

Decided June 18, 1887.

An action for the construction of a will cannot be maintained by a legatee or devisee to determine what he may be entitled to under it.

Appeal from judgment dismissing complaint.

One P. died in 1865, leaving a widow and several children, and a will by which he devised his real

estate to his executors in trust to divide into shares equal to the number of his children, invest and apply to the use of the children during the widowhood of his wife and on her death or remarriage until such child should be twenty-one, and upon the death or remarriage of the widow he devised to each child on becoming twenty-one a share of the property.

One of the daughters died, aged twenty-seven, and leaving plaintiff, her husband, and a will devising to him all her interest under the will of her father. This action is brought to obtain a construction of the will of P. and declare what interest plaintiff is entitled to thereunder. The widow is still alive and has not remarried. The court dismissed the complaint.

Charles H. Luscomb, for applt.

H. B. Closson, for respts.

Held, No error. The object of plaintiff's action was to obtain a construction of this will so far as to determine what he might be entitled to under it as the devisee and legatee of his deceased wife. That such an action cannot be maintained for the construction of a will by a legatee or devisee has been quite clearly settled by the authorities. 11 Hun, 238; 94 N. Y., 243; 89 id., 161. There is no well settled principle sanctioning such an action in plaintiff's behalf. It has been permitted for the guidance and direction of executors and trustees, and now the controversy may, by statute, be determined in an action construing a will for the partition of real estate.

Judgment affirmed, with costs.
Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Bartlett, J.*, concur.

LARCENY. INDICTMENT. AMENDMENT.

N. Y. SUPREME COURT. GENERAL
TERM. FIRST DEPT.

The People, *respts.*, v. Francis
Herman, *applt.*

Decided June 10, 1887.

Where upon a trial for larceny there is a variance between the allegation and proof as to the owner of the goods alleged to have been stolen the indictment may be amended in that respect. The name of the owner is no material attribute of the crime charged.

Section 298, Code Crim. Pro., allowing such amendment, is not unconstitutional.

Appeal from judgment convicting defendant of the crime of larceny.

Defendant was indicted for taking and carrying away certain shoes, the property of the Bay State Shoe & Leather Co. On the trial the people failed to prove the incorporation of said company, but it appeared by the evidence that one B. was its superintendent, having the lawful possession, care and custody of the goods mentioned. Before that evidence was given the court permitted an amendment of the indictment by inserting the statement that B. was the owner of the property.

Abraham Suydam, for applt.

Mackenzie Semple, for respts.

Held, No error. The amendment was made under the authority

contained in § 293, Code Crim. Pro. That section has provided when a variance between the allegation contained in the indictment and the proof shall arise in respect to time, or in the name or description of any place, person or thing the court in its judgment, if the defendant cannot be prejudiced in his defense on the merits, may direct the indictment to be amended according to the proof. It has been further provided by § 281 of the same Code that when the offense charged involves a private injury and has been described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material. The section under which the amendment was allowed was considered by the learned counsel for defendant to have been an infraction of some of the provisions of the Constitution of the State at the time when the appeal was taken; but that was held otherwise in the case of *The People v. Johnson*, 4 N. Y. Crim., 590. See also 53 Miss., 403; 55 id., 434.

The section itself providing for the amendment of an indictment has been enacted in very broad language and it has provided for a variance between the allegation in the indictment and the proof respecting the name of the owner of the property charged to have been stolen. Such a variance did appear upon the trial of this indictment, and it was to correct and avoid it that the amendment was made. The name of the owner

of the property was no material attribute whatever of the crime charged to have been committed by defendant. It was included in no act of his in the way of the commission or consummation of the crime. It was not essential to the crime that the property should be owned by any particular corporation or person, and the principal object of inserting the name of the owner in the indictment was to enable the prosecution to prove the fact that the property was taken without the consent of such owner. The amendment could in no manner prejudice defendant in his defense on the merits, for the gist of the charge was that he had feloniously stolen this property, and he was as well able to secure his acquittal or to meet and remove the charge, if he had the ability to do so, with the name of the superintendent inserted in the indictment as the owner as he would have been if the name of the corporation itself had remained as the owner of the property. The proof as to the absence of consent would be precisely the same in either instance as long as the fact was that the superintendent was the custodian and in possession of the property. It was by his testimony, and his testimony alone, or evidence equivalent to that, by which proof of this fact could legally be made, and as he was the custodian or bailee of this property it was regular to allege him to have been the owner under the legal settled rules of practice governing this subject. 2 Bish. Crim. Pro., 719-20 and notes.

At the common law it is entirely clear that this amendment could not have been made to the indictment. 1 Bish. Crim. Pro., §§ 708-11; 121 U. S., 1; 13 Bush, 337. But where this rule has been abrogated and changed by statute, as it now has been in this State, there the practice has been to permit similar amendments to be made by the court to an indictment. See 65 N. C., 313; 26 Ohio, 326; 14 Tex., 402; 4 N. Y. Crim., 590; 60 Wis., 599; 30 La. Ann., 401; 51 Miss., 675; 6 Cox C. C., 194; 2 Denn. C. C., 464; 8 Cox C. C., 461; 9 id., 297; 10 id., 367; 11 id., 93.

Judgment affirmed.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Brady, J.*, concur.

ELECTION. RESIDENCE.

N. Y. COURT OF APPEALS.

Silvey, respt., v. *Lindsay et al.*, *appls.*

Decided Oct. 4, 1887.

An inmate of the State Soldiers' Home at Bath, who has left his home in N. Y. City with the intention of making his residence at the Home as long as he should be permitted to do so is not a resident of Bath or entitled to vote there, but retains the right to vote in the place of his legal residence.

Reversing S. C., 25 W. Dig., 68.

The question arising in this case is whether plaintiff gained a residence in the town of Bath, Steuben County, so as to entitle him to vote at a town meeting, by reason of his presence as an in-

mate of the soldiers' home, which was duly incorporated under Chap. 270, Laws of 1876. The expenses of said institution and the support of its inmates are paid by the State out of annual appropriations made by the legislature. Plaintiff's vote was rejected on the sole ground that he was not a resident of Bath. He stated that he had been since 1880 up to the time in question, Feb., 1886, an inmate of the soldiers' home; that he intended to make his residence in said institution so long as he was permitted to do so; that he was an honorably discharged soldier of the U. S., and when admitted to the institution a resident and voter of N. Y. City.

J. F. Parkhurst, for *appls.*

M. Rumsey, for *respt.*

Held, That plaintiff was not a resident of Bath, as he was there only in the character of a beneficiary for a temporary purpose and under the Constitution was not entitled to a vote (Art. 2, § 3); that plaintiff's narration of his intention to change his residence to Bath and his assertion that he resided in Bath can be accepted only as conclusions from the circumstances detailed in connection with them.

Also held, That plaintiff has not lost the right to vote in the place of his legal residence.

Judgment of General Term for plaintiff upon case submitted reversed, and judgment ordered for defendant.

Opinion by *Danforth, J.* All concur.

FORECLOSURE.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

The Metropolitan Trust Co.,
applt., v. The N. Y., L. E. & W.
RR. Co., *impl'd.*, *respt.*

Decided June, 1887.

Where a mortgage by its terms covered after acquired property, and every acquisition of property in character like that specified, or within the terms of the mortgage, a mere valid promise or undertaking of a third party, taken for the payment of interest, to give financial support to enable the mortgagor to escape default, is not property which the mortgagee will take by force of the mortgage.

The agreement being executory on both sides, the respondent company having security for its performance, its agreement to make advances in certain events, for the protection of the property of the mortgagor, against the foreclosure of the lien of the mortgage on its property, and not being for the payment of any debt, or the interest on any debt, or in protection of any property of the respondent company, no right of action enured on such agreement to the mortgagee.

Appeal from so much of the judgment entered upon report of a referee as dismisses the complaint as to the N. Y., L. E. & W. RR. Co.

Action for the foreclosure of a mortgage made by defendant, the Tonawanda Valley & Cuba RR. Co., Sept. 1, 1881, to secure the payment of \$500,000 of its bonds, which were soon after issued. The mortgage was made to James Fish, as trustee (in whose place plaintiff was afterward substituted as trustee), by which the company granted and sold its railroad, right of way, lands, rails, tracks, bridges, build-

ings, structures, fixtures and appurtenances, whether then owned and possessed or thereafter to be acquired, all locomotives, engines, cars, shop, tools, machinery and all franchises, rights, privileges and all other corporate property, real and personal, of the mortgagor, whether theretofore or thereafter acquired by it; and whenever default should be made in the payment of the principal or interest all the tolls, incomes, earnings and profits of the company, and all the estate, right, title and interest, property, possession, claim, and demands in law or equity of such company with the appurtenances. Default was made in the payment of the interest which became due on the bonds Sept. 1, 1884. The complaint alleges that on March 12, 1883, the T. V. & C. RR. Co. (called the Tonawanda company) and the N. Y., L. E. & W. RR. Co. (called the Erie company) entered into an agreement "wherein, after reciting that the Tonawanda company had been constructed by parties in sympathy with the Erie company, with a view of contributing to the business of said company and of protecting it against hostile lines in process of construction, and after further reciting that the Tonawanda company may require assistance from the Erie company in the completion of its railroad, and in its successful establishment, operation and maintenance, it was, in consideration of the premises, agreed as follows: The Tonawanda company agrees, first, that it will at all times deliver to

the said Erie company for transportation all the freight and passengers that it can lawfully control or influence destined to points that can be reached by way of the Erie company or its connections, and will use its influence to promote the interests and the business of the Erie company, so far as it can with proper regard to its own interests. Second. That for the protection of the Erie company in rendering assistance to the Tonawanda company under this contract, it will cause to be deposited with the Erie company a majority of the capital stock of the Tonawanda company in such manner as shall be required, upon which, so long as the management of the Tonawanda company shall be satisfactory to it, the Erie company will give or cause to be given to such representative of the Tonawanda company as shall be designated by it the right to vote upon such stock so deposited. The Erie company agrees, first, that, so far as it can with proper regard for its own interests, it will use its influence and exercise its control to promote the interests and business of the Tonawanda company; second, that, upon condition that the corporate control of the Tonawanda company shall become and remain vested in the Erie company as above provided, the Erie company will make good any deficiencies in the net earnings of the Tonawanda company to meet the interest upon its present bonded indebtedness from time to time as the same becomes due and payable, and for any and all advances so

made by it with the interest thereon, as well as for any and all advances so made said Tonawanda company by the Erie company for other purposes with the interest thereon, the Erie company shall have and is hereby granted, first, a lien upon the railroad franchises and property of the Tonawanda company next after its bonded indebtedness aforesaid, and a first charge on its surplus earnings next after the payment of the accruing interest upon its said bonded indebtedness. This contract shall continue during the corporate existence of the companies parties hereto." The complaint further alleged performance of such agreement on the part of the Tonawanda company; that the Erie company failed to make good the deficiencies in the net earnings of the Tonawanda company to meet the interest on its bonded indebtedness; that in making such agreement "it was understood and intended between" the companies that the provision in the agreement "that the Erie company will make good any deficiencies in the net earnings of the Tonawanda company to meet the interest on the bonded indebtedness should enure to the benefit and protection of the bondholders of the Tonawanda company," and that "the breaches thereof by the Erie company passed and enured to plaintiff as trustee," and as against the Erie company plaintiff demanded judgment that it be charged with deficiency.

The referee directed judgment for the foreclosure of the mort-

gage, and sale of the mortgaged property, and determined that the complaint did not state facts sufficient to constitute a cause of action against the Erie company, and judgment was entered accordingly.

Oliver P. Buel, for applt.

E. C. Sprague, for resp't.

Held, The questions presented are : First, whether the agreement of March 12, 1883, between the N. Y., L. E. & W. RR. Co. and the T. V. & C. RR. Co. was valid, and if it was, second, whether the plaintiff in this action is entitled to relief against the former company for the benefit of the bondholders of the latter company. The first question was before this court in the first department in *Tonawanda RR. Co. v. N. Y., L. E. & W. RR. Co.*, 42 Hun, 496, and was there decided in the affirmative; and the court further decided that if the agreement was *ultra vires* the defendant was not in a condition to avail itself of that defense. And for the purposes of this review we treat that question as disposed of. And in that view defendant may be treated as a lienor and a proper party defendant for that reason, but it is assumed here, and will be so treated for the purpose of this review, that the determination by the referee in favor of the defendant was only upon the issues presenting the question of its liability to the plaintiff.

That the mortgage by its terms covered after acquired property and every acquisition by the mortgagor of property in character like that specified or within the terms

expressed in the mortgage, which are to be construed in view of the purposes contemplated to which its use is to be applied. A mere valid promise or undertaking taken for the payment of interest by the company, the mortgagor, to give it support financially by enabling it to escape default, evidently is not the property which the mortgagee took by force of this indenture, although it was obtained by the mortgagor for its financial relief and support, and its performance would have had the effect to enable it to operate its road; *P. W. & B. RR. Co. v. Woelpper*, 64 Penn. St., 366, goes no further than that.

That the agreement between the Erie company and the Tonawanda company was executory on both sides. The Erie company having security for its performance, agrees to make advances in certain events, and such advances go in protection of the property of the Tonawanda company against the foreclosure of the lien of its mortgage, and not to discharge any debt of the Erie company, or any debt on account of which it had any property, or on which it paid interest for such purpose. In this respect the case comes within the doctrine of *Garnsey v. Rogers*, 47 N. Y., 233; *Pardee v. Treat*, 82 Id., 385; *Root v. Wright*, 84 Id., 72. There is, therefore, no right of action in plaintiff as against the respondent company, resting in subrogation or to charge it with the relation of principal debtor to any extent of the interest moneys of the bonds secured by the mort-

gage. And we think that the agreement of March 12, 1883, must be deemed to have been made for the benefit and protection of the Tonawanda company, that no right of action was conferred by it upon plaintiff, and that no allegation of the complaint gives support to this action upon such agreement against the respondent company.

Judgment affirmed.

Opinion by *Bradley, J.; Smith, P.J., and Haight, J.,* concur.

FERRIES. N. Y. CITY.

N. Y. COURT OF APPEALS.

The Mayor, etc., of N. Y., *applt.*, v. Starin et al., *respts.*, and The Independent Steamboat Co., *applt.*

Decided June 7, 1887.

The city of New York has exclusive right to all the ferry franchises to and from it, and where it has established ferries sufficient to accommodate the public it may maintain an action to restrain others from invading its rights.

The fact that a steamboat company has a coasting license gives it no authority to invade the city's ferry rights, and where it does so it cannot question the manner in which the city had leased the franchise.

A mere lessee of the boats of said company is not a proper party to an action to restrain it.

Any one who invades the franchises of another by running a ferry is liable for any damages he may cause such other and may be restrained by the court.

This action was brought to restrain defendants from operating a ferry between the city of New York and Staten Island. Plaintiff's complaint alleged that under the Montgomerie charter the city of New York has exclusive owner-

ship of the ferry franchise between it and Staten Island, and the exclusive right to establish and regulate the ferries with power to let, sell or otherwise dispose of them; that defendants had violated its rights by operating a ferry between it and Staten Island; that before this action was commenced the city had established a ferry between it and Staten Island which it had leased. Defendants denied that the city owned exclusively the ferry franchise or had the exclusive right to lease the ferries, and denied that they were operating any ferry, and alleged that they were engaged in the transportation of goods, merchandise and passengers upon the public waters between Staten Island and New York with steamboats duly enrolled and licensed under the laws of the United States for carrying on a coasting trade. A judgment was rendered in favor of plaintiffs against the defendant steamboat company and the complaint was dismissed as to the other defendants, who were lessees of said company. It appeared that plaintiff had established and operated ferries adequate for the public convenience.

Noah Davis, for defts., *appls.*

James C. Carter and *W. W. Macfarland*, for plff.

James McNamee and *Adolph L. Pincoffs*, for John H. Starin and others, *respts.*

Held, That plaintiff having discharged its duties to the public as owner of the ferry franchises by establishing ferries sufficient to accommodate the public could

maintain this action; that the fact that the Independent Steamboat Company had a coasting license did not authorize it to invade the franchises of the city, and having invaded such franchises it was not in a position to question the manner in which the city had leased the franchise.

Also held, That the other defendants, who were mere lessees of the steamboats, were not proper parties to the action.

A ferry is a continuation of the highway from one side of the water over which it passes to the other and is for the transportation of passengers or travelers with their teams and vehicles and such other property as they may carry or have with them. 94 N. C., 674. In a strictly ferry business property is transported only with the owner or custodian, but the business of a common carrier may be combined with it. Ferrymen are under a public duty to transport with suitable care and diligence all persons with or without their vehicles and other property, and if they are common carriers also it is their duty to carry all freight and merchandise delivered to them. 52 N. Y., 32.

No one has the right to set up a public ferry and charge tolls for the transportation of persons and property without the license of the sovereign. Penal Code, § 416; 2 Washburne on R. P. (3d ed.), 269. A ferry franchise is property—an incorporeal hereditament, and as sacred as other property. 1 Black, 603. The right to a ferry does not depend upon the right to or the

property in the waters over which it passes or in the soil thereunder, or upon the shore at either end of the ferry.

Any one who invades the franchise of another by running a ferry is liable for any damage he causes such other person, and may be restrained by the judgment of a competent court.

If the owner of a ferry franchise fails to establish and maintain a ferry he could not in a civil action restrain any other person from operating the ferry or recover any but nominal damages.

If the owner of an exclusive ferry franchise fails to establish sufficient accommodations for the public he may be proceeded against by the sovereign and compelled to discharge his public duties or his franchise may be forfeited.

Under the grant contained in the Montgomerie charter the city did not merely acquire the political right to acquire and regulate ferries, but also the property in the ferry franchises. It was not intended to limit the right of the city to ferries from some point in the city to a point diametrically opposite, but to secure to it all the ferry franchises to and from it.

The common law rule which requires that all gratuitous grants by the sovereign of exclusive privileges and franchises shall be strictly construed and any ambiguity in them must operate against the grantee and in favor of the sovereign or the public, is not fully applicable to the grant of a ferry franchise as that is never without consideration as it imposes upon

the grantee the obligation to maintain a ferry with suitable accommodations for the convenience of the public. *Gale*, 164; 14 L. T. R., N. S., 298.

Also held, That this rule would not apply to the provisions of the Montgomerie charter, as the charter itself enjoins that it shall in all things "be construed, taken and expounded most benignly, and in favor of and for the most and greatest advantage, profit and benefit of the said mayor, commonalty and the city of New York."

Also held, That if the practical construction of the charter by the parties interested, as evidenced by their acts, as to the ferry franchises granted thereby, has been uniform, it is entitled to great, if not controlling weight.

Judgment of General Term, affirming judgment dismissing complaint, affirmed, and judgment of General Term against defendant, the Independent Steamboat Company, modified so as to restrain it only from maintaining and operating any ferry between the city and Staten Island, and as modified affirmed.

Opinion by *Earl, J.* All concur.

RECEIVERS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Louise Chaude v. Eugene Chaude.

Decided May 13, 1887.

A receiver may be required to account on the application of a creditor of the estate, even though the original action in which

he was appointed has been compromised by the parties thereto.

Appeal by the receiver from an order directing him to account, that petitioners be allowed to intervene on the accounting and that their claim be paid out of moneys found in his hands.

The action was brought to determine the ownership of a hotel business, and a receiver was appointed by consent. The action has been compromised between the parties, defendant relinquishing his claims and plaintiff has remained in possession. The receiver has never accounted or been discharged. Petitioners recovered judgment against plaintiff for goods sold to the hotel and which have been sold by the receiver; they have never issued execution.

They thereupon made this application for an accounting, which the receiver defended on the ground that the action was settled, that he had no funds and that petitioners were not parties to the action and had no interest therein.

E. B. Hill, for applt.

W. H. Phillips, for respt.

Held, That the order was properly granted. It has been properly observed that the receiver being an officer of the court and not of the parties litigant is required to account to the court from which he received his appointment. High on Recrs., § 802. We entertain no doubt whatever of the power of the court to make the order appealed from, and regard it as having been eminently proper.

If the contention on the part of the appellant should be tolerated then the parties by an arrangement between themselves could dissipate the whole estate and deprive the creditors of the application of any part of the fund to the payment of their debts.

Order affirmed, with \$10 costs and disbursements.

Opinion *per curiam*.

CONSTITUTIONAL LAW. RAILROADS.

N. Y. COURT OF APPEALS.

In re application of The N. Y. District R. Co.

Decided Oct. 4, 1887.

Chapter 582, Laws of 1880, so far as it authorizes the appointment of commissioners whose order shall be a substitute for the consent of the city authorities is unconstitutional.

Affirming S. C., 26 W. Dig., 149.

Appeal from order of General Term denying application for the appointment of commissioners under Chap. 582, Laws of 1880, to determine whether the petitioner, The N. Y. Dist. Railway Co., should be allowed to be built under certain streets, roads and public places and in what manner the same should be built. The petitioner is a corporation formed under the General Railroad Act of 1850, Chap. 140, for the purpose of constructing a railway "for the conveyance of persons and property, etc., in the city of New York." The petitioners allege that the consent of the owners of one-half in value of the property along the line could not be obtained, nor

could the consent of the city authorities.

Grosvenor P. Lowery, Ch. Francis Stone and Esek Cowen, for applt.

Edward W. Paige, Edward B. Thomas, David J. Dean, Henry D. Sedgwick and Horace Russell, for respts.

Held, That the application must stand or fall upon the authority invoked by the petitioner, there being no other statute that warrants such an application; that the Act of 1880, so far as it authorizes the appointment of commissioners whose order shall be a substitute for the consent of the city authorities, is in contravention of § 18 of art. 3 of the Constitution, which provides that "no law shall authorize the construction or operation of a street railroad" except upon condition of the two consents referred to; that the Act of 1880 authorizes and regulates underground street railways in cities or villages and that the appellant's road is such a railway; that such a road is to be deemed a street railway, not only because it subserves street purposes and reaps the benefit of street easements, and occupies and modifies the street surface, but also because it is fully within the mischiefs which the Constitutional provision was designed to redress and prevent; that the Rapid Transit Act of 1875, Chap. 606, applies to roads as well on or above the surface of the street as to those which are built beneath in the manner contemplated by the petitioner.

Chapter 140, Laws of 1850, does not apply to street railroads. 104 N. Y., 1. If said act had any application to street railroads it was taken away by Chap. 10, Laws of 1860, which provides that "it shall not be lawful hereafter to lay, construct or operate any railroad in, upon or along any of the streets or avenues of the city of New York, wherever such railroad shall commence or end, except under the authority and subject to the regulations or restrictions which the legislature may hereafter grant or provide."

Also held, That the provision of the Act of 1880, which makes the order of the court confirming the commissioners stand for the consent of the authorities and the property owners, cannot be limited to the consent of the property owners alone, but it would not be the order authorized by the statute.

Order of General Term, denying the petition for appointment of commissioners, affirmed.

Opinion by *Finch, J.* All concur.

PAYMENT. PARTNERSHIP.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Francis B. Thurber et al., *respts.*,
v. John E. McIntyre, *applt.*

Decided June 18, 1887.

Where one of the members of a firm which is indebted retires and another person takes his place, the business being conducted under the same name and in the same manner as before, to sustain a claim that a subsequent general payment on account should be credited to the new

account and not to the old one it must be shown that the money paid was the property of the new firm.

Appeal from judgment in favor of plaintiffs, entered on verdict.

Action for goods sold. One N. and P. were partners under the firm name of N. & Co., which firm was in March, 1885, indebted to plaintiffs for goods sold. On March 23 P. retired and a partnership was formed between N. and defendant under the same firm name and the same business was carried on. Between that date and April 15 plaintiffs sold and delivered to the new firm goods to the amount of \$479.27 on a credit of thirty days. Between April 3 and 15 N.'s husband, who managed the business for both firms, paid to plaintiffs by checks of the firm sums amounting to the amount of the old account, only stating at the time that he wanted to make a payment on account. Plaintiffs credited these payments on the old account.

In July, 1885, the new firm was dissolved by mutual agreement, defendant buying out the business and agreeing to pay all debts of said new firm. This action was brought to recover on the new account, and defendant claimed that the sums so paid as aforesaid should be credited. The claim was disallowed by the court.

John H. Miller, for *applt.*

H. Aplington, for *respts.*

Held, No error. If there had been no change in the firm of N. & Co. during the time the goods were purchased there is no question but that the proper order of

application of the payments would have been to apply such payments upon that part of the account which was due in preference to an application upon that part of the account which was not due, and under the proofs in this case it would appear that plaintiffs were justified in assuming that the new firm were the successors of the old and that it was a mere continuation of the business of the old firm. Defendant, under such circumstances, in order to claim that the credits should be applied to the new account was bound to show that the money which had been received by plaintiffs was the property of the new firm and that it was therefore inequitable that it should be applied to the payment of the debts of the old firm. There is no proof, however, in the case but that the money which was paid may have belonged to the old firm or that the check was not in reality that of the old firm. There seems, therefore, to have been a failure to prove a very material fact which it was necessary to establish before defendant could maintain his claim to the credit demanded.

Judgment affirmed, with costs.

Opinion by *Van Brunt, P.J.*; *Daniels, J.*, concurs.

BANKRUPTCY. JUDGMENT.

N. Y. COURT OF APPEALS.

The West Philadelphia Bank, *applt.*, v. Gerry, *impl'd.*, *respt.*

Decided Oct. 4, 1887.

A bankrupt is not bound to procure a stay
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of proceedings pending in the State courts.

The decision of the Supreme Court on the question of laches is not reviewable by the Court of Appeals.

On an application by a member of a partnership for a discharge from his debts a partnership debt could be proved whether there were partnership assets or not, and he would be entitled to be discharged therefrom.

For the purposes of § 1268 of the Code a judgment is regarded as the old debt in a new form and a discharge of the cause of action discharges the judgment.

A judgment was obtained in the above entitled action against defendants as co-partners, and the defendant G. now applies under § 1268, Code Civ. Pro., for an order directing said judgment to be canceled and discharged of record as to him. It appeared on the motion that in May, 1875, G. was a member of the firm of G. T. & C., and as such indebted to plaintiff upon a promissory note of that date made by said firm. The note not being paid on Jan. 10, 1883, plaintiff recovered a judgment in the Supreme Court of this State against G. and the other members of the firm. It also appeared that on Aug. 3, 1878, G. being then a resident of Massachusetts filed in the proper court a petition that he be adjudged a bankrupt. He was so adjudged and thereafter so conformed to the requirements of the United States bankruptcy statutes that on March 30, 1883, the United States Court, sitting in bankruptcy for the district of Massachusetts, ordered that G. be "forever discharged from all debts and claims which" under the bankruptcy statutes were provable against his

estate, and which existed on Aug. 3, 1878, subject to certain exceptions, of which the judgment in question is not one. In Sept., 1886, G. made the present application, which was granted by the court.

Plaintiff claims that G. was guilty of laches in not obtaining a stay from the United States Court of the proceeding in the action in the State court.

James Armstrong, for applt.

Robert Payne, for respt.

Held, Untenable; that if he could have done so, he was not bound to take that course; that the doctrine of laches does not apply; that if it did it was for the Supreme Court to deal with it, and its decision cannot be reviewed.

Medbury v. Swan, 46 N. Y., 200, distinguished.

Upon an application by a member of a co-partnership for a discharge in bankruptcy from all his debts, a partnership debt could be proved whether there were assets of the partnership or not, and the petitioner would be entitled to be discharged therefrom. 1 N. B. R., 201; 35 How. Pr., 409.

It appeared that B.'s schedules in bankruptcy set forth the debt which constituted the cause of action, and the amount and date, etc., of a note upon which the judgment was recovered, and the name and address of plaintiff as a creditor by virtue of it. The judgment was not included in the schedules.

Held, That for the purpose of the Code, § 1268, the judgment is regarded as the old debt in a new form, and a discharge of the cause

of action discharged the judgment which is founded upon and represents it, 3 N. Y., 216; 50 id., 593; that the relief formulated by said section of the Code had long ago been affected by the uniform practice of the courts, 4 Johns., 191; 1 Cow., 165; 1 Barb. Ch., 347; that said section introduced no new law, but was in uniformity with that practice and affirmatory of it.

Order of General Term, affirming order of Special Term, granting motion, affirmed.

Opinion by *Danforth, J.* All concur.

PATENTS.

N. Y. COURT OF APPEALS.

Hyatt, respt., v. *The Dale Tile Mfg. Co. (limited)*, *applt.*

Decided June 7, 1887.

Plaintiff licensed defendant to manufacture and sell certain articles within certain territory, agreeing not to manufacture said articles himself. Subsequently the patent was reissued. *Held*, That there was a sufficient consideration for defendant's agreement to pay royalties and that it was liable therefor.

Where notice of forfeiture for non-payment of royalties has been withdrawn on a promise of the licensee to pay, a failure to carry out such promise gives a good cause of action.

In 1867 a patent was issued to plaintiff, which was reissued in Aug., 1878, and Sept., 1881. By an agreement dated Nov., 1878, plaintiff licensed three firms to manufacture and sell, within certain territory named, the articles covered by the patent of 1867 as reissued in 1878, plaintiff agreeing not to carry on the manufacture

of said articles and not to grant any other license without the consent of said firms. They manufactured and sold the patented articles until some time in 1869, when controversies arose between them and plaintiff, which resulted in a series of actions, all which were withdrawn and settled, and the said parties thereupon entered into a further agreement reaffirming the agreement of 1878, which is dated Nov. 24, 1880, and permitting plaintiff to license defendant upon the same terms and conditions as those contained in the said agreement of 1878. Contemporaneously with the execution of the agreement of 1880, plaintiff assigned in writing upon certain trusts to E., the attorney in fact of plaintiff, and A., the attorney of the other parties, all royalties thereafter to become due to her by reason of any license theretofore granted by her to manufacture and sell under said patent in the territory in which said persons were licensed to manufacture and sell, except the royalties payable by said three firms under the agreement of 1878. On Dec. 28, 1880, plaintiff licensed the defendant to manufacture and sell under said patent within certain territory including that covered by the agreement of Nov., 1878. Defendant accounted for and paid royalties to Aug., 1881, and rendered a statement pursuant to its agreement of Dec., 1880, for the quarter ending Oct. 31, 1881, which admitted an indebtedness of \$524.55, which defendant thereafter refused to pay and to recover which

this action was brought. Plaintiff had agreed with the several licensees not to manufacture the patented articles.

Defendant's counsel claimed that since the reissue of the patent in 1881, defendant has had no protection from the manufacture of the patented article by others, for the reason that by the surrender of the patent of 1878, and the reissue of 1881, there was no valid patent in existence, and the consideration for the promise to pay royalties had therefore wholly failed.

Edward D. McCarthy, for applt.

George W. Van Slyck, for respt.

Held, That there was sufficient consideration for defendant's promise to pay royalties as plaintiff had bound herself not to manufacture, and as defendant could not be called to account as an alleged infringer while manufacturing under the license; that so long as defendant continued to manufacture under its license (the patent not having been legally annulled) and thus elected to treat the agreement as in existence, plaintiff could only treat defendant as a licensee. If defendant desired to repudiate any obligation under this agreement it should have given notice to plaintiff that it refused to longer recognize its binding force, and that it would thereafter manufacture under a claim of right founded upon the alleged invalidity of the patent.

The agreement between the parties contained a clause providing for a forfeiture of all rights thereunder if one party should willfully

violate one of its provisions. Plaintiff gave notice of such forfeiture, based upon defendant's refusal to pay the royalties due for the quarter in question here. Subsequently plaintiff withdrew said notice at defendant's request and upon its promise to pay said royalties.

Held, That a failure to carry out such promise gave plaintiff a good cause of action.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Peckham, J.* All concur.

EXTRA ALLOWANCE.

N. Y. COURT OF APPEALS.

Adams, respt., v. Arkenburgh et al., applts.

Decided Oct. 4, 1887.

The complaint alleged a partnership between plaintiff and his father, the investment by the latter in his own name of assets of the partnership and the receipt by him of large sums in rents and dividends from such investments, and prayed for a dissolution and an account of such receipts. Judgment was rendered for defendants and an extra allowance was granted them. *Held*, That one-half the securities and money mentioned constituted the subject matter, that one-half the amount stated furnished the basis of computation for an extra allowance, that a case was made for the exercise of the discretion of the trial judge, but that his decision was subject to review by the General Term.

This action was brought by plaintiff to establish a partnership between his father, now deceased, and himself, and to declare the dissolution thereof, and for an accounting. He gave notice with

the summons that, upon default of an appearance or answer, judgment would be taken by him for \$65,000 with interest from April, 1875. The complaint alleged the partnership of plaintiff with his deceased father, an investment by the latter in his own name of specific amounts of the joint funds of the partnership in the purchase of specific real estate and securities, and the receipt by him of the rents and dividends issuing therefrom, amounting in the aggregate to large sums, of which an approximate estimate is made. The complaint further alleged that the income was not less than \$5,000 per annum, equal in gross to upward of \$100,000, which was received and invested by plaintiff's father as before stated, and that plaintiff's father had received dividends, etc., from such investments amounting to another \$100,000. Judgment was asked that the partnership should be dissolved, and that an account be taken not only of the partnership business, but of the receipts of moneys, investment of the same, dividends, rents, etc., and of all the rights, etc., of the plaintiff thereto as specified in the complaint. A judgment was rendered for defendants, and an extra allowance granted to them of \$2,000.

Fred. M. Littlefield, for applts.

H. V. Borst, for respt.

Held, That one-half of the property, securities and money mentioned as the assets of the partnership constitute the subject matter involved in this action; that one-half of the value as stated in the

complaint furnishes a sufficient basis for computation of an allowance; that the judgment rendered is conclusive of the right of the defendants to retain as the individual property of plaintiff's father all the property described, and a case was made upon which the discretion of the trial judge as to allowance might be exercised. 92 N. Y., 401; Code Civ. Pro., § 3253.

Weaver v. Ely, 83 N. Y., 89; Struthers v. Pearce, 51 id., 365, distinguished.

The order appealed from recited that the order of Special Term was reversed upon questions of law and not upon a review of the discretion of the judge, by whose directions the order of an extra allowance of costs was given.

Held, That the decision of the trial judge is subject to review by the General Term, and as that court has disposed of it without passing upon the merits its order should be reversed and the case remitted to it for further consideration.

Order of General Term, reversing order of Special Term, reversed.

Opinion by *Danforth, J.* All concur.

EXECUTOR. COSTS.

N. Y. COURT OF APPEALS.

Hone, *exr.*, *respt.*, v. DePeyster, *exr.*, *applt.*

Decided Oct., 4, 1887.

An executor, who was also an heir, brought action to recover assets and was defeated. An order was granted charging him personally with the costs on the

ground that he should have brought the action individually. The General Term held that he was not guilty of bad faith, but was chargeable with one-half the costs as he was beneficially interested to that extent. *Held*, Error.

This action was brought by plaintiff as executor to enforce a claim against the estate of DeP., defendant's testator. It appeared that H., plaintiff's testatrix, married DeP., defendant's testator, in 1839. In 1869 she died leaving her husband surviving. By her will she devised and bequeathed to him all her property for life, and after his death a legacy of \$10,000 to the plaintiff, her son, and directed that the remainder of her property should be divided equally between plaintiff and his sister. De P. was made sole executor, and plaintiff was named successor in case of his death. De P. died in 1882 and thereafter plaintiff took upon himself the execution of the will. The only property received by plaintiff under the will consisted of a house and lot in New York valued at about \$20,000 and a claim against De P.'s estate for property belonging to his wife which had some time been converted to his own use. It was sought to recover in this action the value of the property thus converted. It was decided that De P. having married previous to the enactment of the statutes relating to the rights of married women, became under his marital rights entitled to so much of his wife's personal property as he had reduced to possession before his death, and that the action could not be maintained.

A judgment was rendered for the defendant which contained a direction that defendant recover of plaintiff as executor, etc., \$902.41 costs. This judgment on appeal, was reversed by the General Term, and a retrial of the issue ordered. Defendant appealed to this court and the judgment entered upon the report of the referee was affirmed with costs against plaintiff as executor, etc. Final judgment was rendered upon the remittitur against plaintiff as executor, etc., "for the sum \$359.91" costs and for an affirmance of the original judgment. Upon petition of the defendant, an order was made at Special Term, requiring plaintiff personally to pay such costs on the ground that he brought the action unnecessarily in his name as executor when it could be maintained by him individually, and that it was an evidence of bad faith that he had not brought it individually. The General Term reversed the order of the Special Term so far as it was based upon the element of bad faith, but held that plaintiff was chargeable with one-half of the cost, on the ground that he was beneficially interested in the recovery to that extent.

G. H. Brewster, for applt.

G. H. Crawford, for resp't.

Held, Error; that the action was necessarily brought in the name of the executor, and he represented other interests than his own in its prosecution; that the cause of action was not divisible, and the executors duty required him to pursue it in the only

way in which it was sustainable; that the General Term having reached the conclusion that there was no evidence of bad faith on the part of the plaintiff in the prosecution of the action, no ground remained upon which under the statute any part of the order of the Special Term could be upheld (Code, § 3246).

Also held; That the express adjudications of the trial and appellate courts upon the subject of costs debarred the defendant from again raising the question as to the fund or person chargeable with their payment. It was the duty of those courts to determine whether the executor was liable personally for such costs or not. A collateral attack upon such adjudication is unauthorized. 3 Abb. Ct. App., Dec., 86; 80 N. Y., 46.

Orders of Special and General Terms reversed and prayer of petitioner denied.

Opinion by *Ruger*, Ch. J. All concur.

FIREMEN. REMOVAL. CERTIORARI.

N. Y. COURT OF APPEALS.

The People ex rel. McLoughlin, *applt.*, v. Fire Comrs. of Brooklyn, *respts.*

Decided Oct. 4, 1887.

Where the return is silent as to the allegations of the petition the case must be heard both on the petition and return, and the allegations of the petition must be taken as true.

An inspector of kerosene oil is a member of the fire department and cannot be removed without a hearing and conviction.

Appeal from order of General

Term, affirming order of Special Term affirming the removal of relator as an inspector of kerosene from the Department of Fire and Buildings of the city of Brooklyn. The relator sued out a writ of *certiorari* to review the proceedings resulting in such removal. The petition set forth that the relator was "a member of the Department of Fire and Buildings in the city of Brooklyn, and that he held the position of kerosene inspector in said department" and was unlawfully removed. The return was silent as to the allegations of the petition.

Edward F. O'Dwyer, for applt.

Almet F. Jenks, for respt.

Held, That the case must be heard both upon the petition and return, and the return being silent as to the allegations of the petition they must be taken as true. Section 14 of title 13 of the charter of 1873 (Chap. 863), which regulates the removal of a member of the Department of Fire and Buildings, applies, and requires a hearing and conviction. The Department of Fire and Buildings is authorized to control and regulate the storage of gunpowder and inflammable oils and to appoint as many "officers and inspectors" as the common council shall authorize, which should "at all times be under the control of said commissioners, and perform such duties as may be imposed upon them by the said commissioners."

Held, That an inspector of kerosene oil could therefore be a member of the fire department.

Orders of General and Special

Terms, and the order of commissioners removing relator, reversed.

Opinion *per curiam*. All concur.

RECEIVER. LEASE. PARTITION.

N. Y. COURT OF APPEALS.

Weeks et al. v. Cornwell et al.

Decided Oct. 4, 1887.

The court has jurisdiction in an action of partition to grant an order on the *ex parte* application of the receiver for the leasing of the property for a time certain which may extend beyond the termination of the litigation, and has the power to set aside or modify such order, but it is proper, as a condition for granting such modification, to award indemnity out of the fund to *bona fide* lessees.

This action was brought for the partition of real estate. The property sought to be partitioned consisted of four houses and lots in the city of New York of great value. The rights and interests of the several parties depended upon the construction of the will of W., and involved the determination of complicated and difficult questions.

On Feb. 6, 1883, upon the petition of one of the defendants, notice having been given to the other parties, an order was made without opposition appointing a receiver in the action. The order authorized the receiver to lease the premises for terms not exceeding three years from May 1, 1883. On Oct. 19, 1885, pending an appeal to the General Term, the receiver, upon an affidavit alleging the appeal and that he had been informed that the case had been carried to the Court of Appeals,

and that it would not be finally determined until long after May 1, 1886, and that unless he was empowered to renew the leases for another term defendants might leave and the houses remain untenanted, applied for *ex parte*, an order which was granted authorizing the receiver to lease the property "for a term or terms beginning from the first of May, 1886, and not extending beyond the first of May, 1889." The receiver thereupon renewed two of the leases from May, 1886, and granted a lease for three years from said date to a new tenant. On May 3, 1886, the General Term affirmed the judgment of the Special Term declaring the rights and interests of the several parties and directing a sale of the premises. That judgment was affirmed by this court in Feb., 1887. The Special Term subsequently, upon application of the parties to the suit, made an order modifying the order of Oct. 19, 1885, so that it should stand as an order authorizing the leasing by the receiver for the term of one year from May, 1886, and declaring that the leases executed by the receiver were valid for only one year.

Edward M. Shepard, for appls.

Flamen B. Candler, for respts.

Held, That the court had jurisdiction to grant an order on the application of the receiver *ex parte* without notice to the parties to the action for the leasing of the real property for a term certain, which may extend beyond the term of the litigation; that the court had therefore the power to set aside or

modify the order of Oct. 19, 1885, but the leases were not void, the lessees having acted *bona fide* and in reliance upon the order of the court, and it was proper for the court to award them indemnity out of the fund arising on the sale under the judgment in partition for any damages to the lessees as a condition to granting the motion.

Orders of General and Special Terms affirmed.

Opinion by *Andrews, J.* All concur.

NUISANCE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Margaret Bohan, respt., v. The Port Jervis Gaslight Co., applt.

Decided July, 1887.

In the absence of a statute prescribing or sanctioning the location of a gas factory or storage tank the company is not relieved by the fact of its incorporation from liability for damages to adjoining property caused thereby. Its authority to hold property for such purposes confers no authority which will justify an injury to private property.

Appeal from judgment in favor of plaintiff, entered on verdict.

Action to recover damages sustained by plaintiff from the depreciation in value of her property caused by the manufacture of gas in close proximity thereto by defendant, and to restrain the continuance of the nuisance. It appeared that plaintiff had been deprived of the comfortable enjoyment of her house by the foul odors from defendant's works, which had corrupted the atmosphere and

rendered a residence in the house uncomfortable and unhealthy.

Defense, that no recovery could be had because the precise use to which the property was applied was sanctioned by the legislature, defendant being a corporate body duly organized under legislative authority and authorized to procure and use real property in the manner it has done.

The case was submitted to the jury under a proper charge, and they returned a verdict for plaintiff.

Lewis E. Carr, for applt.

T. J. & J. W. Lyon, for respt.

Held, No error. The principle invoked has a well recognized place in the jurisprudence of this country, and in England also, and it received its best illustration in this State in 23 N. Y., 42, and 20 W. Dig., 454. In both of these cases the precise use of the property complained of was authorized, and so it was decided that no recovery could be had for the injury complained of without proof of negligence in the use of the property.

The difficulty with the defense here is that it has no foundation in the facts of the case, because the legislature has in no sense prescribed or sanctioned the location of the gas factory or the tank for storage. It is true, defendant has power and authority to purchase and hold real property, and manufacture and distribute and sell illuminating gas. But that confers no authority or power which will sanction or justify an injury to private property. While

it is true that the legislature has conferred such power on defendant and all similar trading corporations, yet it must not be exercised in a manner injurious to others, and in that respect it remains subject to the same rules that would be applied to a private individual. See 103 N. Y., 10.

Judgment affirmed, with costs.

Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

SALE. TITLE.

N. Y. COURT OF APPEALS.

Anderson, assignee, *respt.*, v. *Reed et al.*, *applts.*

Decided Oct. 4, 1887.

Defendants signed a contract which stated that they "had sold" to R. & Co. 1,000 tons of superphosphates at a specified rate, the goods to be sampled and analyzed by certain persons named. R. & Co. gave an order for the goods to D., which defendants accepted and took notes of R. & Co., who shortly after failed. *Held*, That the title to the goods did not pass, as they were to be analyzed before delivery and were not identified; that the subsequent acts of the parties did not make it an executed contract and that defendants were not estopped from denying a right to a delivery of goods of the same quality. Reversing S. C., 21 W. Dig., 270.

This action was brought by plaintiff as assignee for the benefit of the creditors of one De L. for damages for failure to deliver certain goods under certain contracts. It appeared that in Dec., 1881, the firm of which defendants were the members entered into a contract with R. & Co. to sell the latter 1,000 tons of ammoniated superphosphates. The contract stated that defendants' firm "had sold"

and that it would not be finally determined until long after May 1, 1886, and that unless he was empowered to renew the leases for another term defendants might leave and the houses remain untenanted, applied for *ex parte*, an order which was granted authorizing the receiver to lease the property "for a term or terms beginning from the first of May, 1886, and not extending beyond the first of May, 1889." The receiver thereupon renewed two of the leases from May, 1886, and granted a lease for three years from said date to a new tenant. On May 3, 1886, the General Term affirmed the judgment of the Special Term declaring the rights and interests of the several parties and directing a sale of the premises. That judgment was affirmed by this court in Feb., 1887. The Special Term subsequently, upon application of the parties to the suit, made an order modifying the order of Oct. 19, 1885, so that it should stand as an order authorizing the leasing by the receiver for the term of one year from May, 1886, and declaring that the leases executed by the receiver were valid for only one year.

Edward M. Shepard, for applts.

Flamen B. Candler, for respts.

Held, That the court had jurisdiction to grant an order on the application of the receiver without notice to the parties in an action for the leasing of real property for a term which may extend beyond the term of the litigation, and that the court had therefore power to modify or

modify the order of Oct. 19, 1885, but the leases were not void as the lessees having acted bona fide in reliance upon the order of the court, and it was proper for the court to award them interest on the judgment in part in satisfaction of the damages to the lessors in connection with granting the order.

Orders of General Term affirmed.

Opinion by *Anders* concur.

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 court to do so.

Joseph A. Shoudy, for applts.

King & Clement, for resp't.

Held, That the undertaking was
 not executed by the sureties, as
 claimed. By the execution of the
 undertaking the plaintiffs incurred
 no additional responsibility. He
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to R. & Co. 1,000 tons of ammoniated superphosphates, at a specified price, to be paid for on delivery to buyers of bills of lading by their notes. The superphosphates were guaranteed by the vendors to be of a specified quality, and they were to be sampled and analyzed by certain parties who were named, and they were to be shipped as early as possible during the month of Dec., 1881. In Sept., 1881, R. & Co. had contracted to deliver to De L. 2,000 tons of the same general kind of fertilizer, deliverable in Nov. and Dec., 1881, and Jan., 1882. Only 300 tons had been delivered to De L.. The latter agreed to accept the goods purchased of defendants and apply them upon his contract. This agreement between R. & Co. and De L. was known to defendants, and upon being informed by R. & Co. that they wanted the goods to deliver them under their contract with De L., defendants accepted an order drawn on and presented to them by R. & Co., which required them to deliver the goods "sold to" R. & Co. to De L. Defendants gave R. & Co. a writing, which stated that they would deliver the goods to De L. under the order upon vessels De L. was to furnish, and that defendants would make the last delivery in Dec., 1881, or early in Jan., 1882. Notes for the purchase price of the goods were given by R. & Co., as they agreed the superphosphates were not manufactured at that time. The order of R. & Co. accepted by defendants and a memorandum of the latter were delivered to De L., who

gave to R. & Co. his own note accepted by third persons in payment of the goods. Soon after this R. & Co. made an assignment for the benefit of their creditors, and defendants refused to deliver the goods unless they were paid the purchase price, and offered to surrender the notes which had been delivered to them.

Algernon S. Sullivan, for applts.

E. Louis Lowe, for respt.

Held, That the contract of defendant with R. & Co. was executory and no title to the goods passed, there being a provision for an analysis of the goods before delivery or payment, 3 Wend., 112, and there being in the contract no specification, identification or description of the particular property sold. 19 N. Y., 333.

Also held, That by the subsequent acts of the parties the contract did not become an executed one; that the so called delivery order signed by R. & Co. and addressed to the defendants is not a bill of lading or a warehouse receipt, and no more than an assignment of the right of R. & Co. under the contract with defendant to De L.

Also held, That although the contract uses the word "sold," that language must be construed in connection with the rest of the contract. The contract must be taken as a whole, and such construction placed upon it as the language used and the entire instrument calls for.

It was claimed that defendants were estopped from denying the legal right of plaintiff to a delivery

of goods of the same character and quality as described in the contract, and from showing that no title passed. This question was submitted to the jury.

Held, Error; that the claim was untenable. L. R., 1 C. P. Div., 445.

Knights v. Wiffen, L. R., 5 Q. B., 660, distinguished.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed, and new trial ordered.

Opinion by *Peckham, J.*; *Rapallo, Earl* and *Finch, J.J.*, concur; *Danforth, J.*, reads for affirmance; *Ruger, Ch. J.*, and *Andrews, J.*, concur.

ARREST. UNDERTAKING.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

William E. Perry et al., *appls.*, v. John L. Smith, *respt.*

Decided June 18, 1887.

An undertaking on arrest does not comply with the statute requiring two sureties where it is signed by one of the plaintiffs and one surety.

An affidavit to obtain an order of arrest should contain the evidence from which the court can draw conclusions, and not the conclusion of the affiant drawn from evidence which is not furnished to the court.

Appeal from order vacating order of arrest.

Plaintiffs procured an order for the arrest of defendant on an affidavit stating that they had a good cause of action against him for money obtained in a fiduciary capacity and misappropriated; that plaintiffs entered into an

agreement with him by which they were to advance moneys with which he was to go West and buy potatoes and ship them to plaintiffs for sale, the profits to be equally divided between plaintiffs and defendant, and such moneys not used by defendant to be returned to plaintiffs on demand, that about \$655 was misapplied by defendant to the purchase of pork; that "on the 8th day of Dec., 1885, I had a conversation with defendant wherein he admitted that he had purchased pork with the balance of the money advanced to him and not used in the purchase of potatoes as aforesaid, and he promised to pay the said money immediately, but has failed to do so." The undertaking was signed by one of the plaintiffs and one surety.

Motion to vacate was made and granted on the ground that it was not signed by two sureties. On the hearing plaintiffs offered to amend the undertaking in that respect, which was denied on the ground of want of power in the court to do so.

Joseph A. Shoudy, for *appls.*

King & Clement, for *respt.*

Held, That the undertaking was not executed by the sureties, as claimed. By the execution of the undertaking the plaintiffs incurred no additional responsibility. He without having signed any undertaking at all would be liable for all dangers sustained by defendant if the order was vacated or defendant succeeded in the action, and it is evident therefore that no additional security is offered by one

of the plaintiffs becoming a party to the undertaking.

Whether the court has power to amend an undertaking on arrest when executed by only one surety not determined.

Also held, That the order should not have been issued on the affidavits presented. The allegation in the affidavit is that the money not used should be repaid upon demand and there is no proof of any demand having been made. It is true that plaintiff avers that in an interview held with defendant on Dec. 8, 1885, he promised to pay the said money immediately, but has failed to do so, but there is no assertion of a demand. Plaintiff deposes of his own knowledge as to the use made of the money by defendant when he had no personal knowledge on the subject, it subsequently appearing that whatever knowledge he had arose from conversations alleged to have contained admissions made by defendant; what the conversations were from which plaintiff deduces these admissions we are not informed, and there is no evidence contained in the affidavit of anything justifying plaintiff in claiming that defendant had made any admission to him whatever. An affidavit should contain the evidence from which the court can draw conclusions, and not the conclusion of the affiant drawn from evidence which is not furnished to the court.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Van Brunt, P.J.*; *Daniels* and *Bartlett, JJ.*, concur.

JUSTICE'S COURT. APPEAL. EVIDENCE.

N. Y. SUPREME COURT. GENERAL
TERM. SECOND DEPT.

Alexander H. Dudley, *applt.*, v.
Matthew V. B. Brinkerhoff, *respt.*

Decided July, 1887.

Where an appeal from Justice's Court has been regularly taken and perfected the court has jurisdiction of the same, although the notice demands a new trial to which appellant is not entitled.

Where it appears that goods were sold to defendant, but charged to his son, who ran his farm, evidence that former sales charged to the former occupant of the farm were settled for by defendant is admissible.

Appeal from judgment dismissing complaint and from order denying motion to dismiss appeal to County Court.

Action brought in Justice's Court for goods sold by plaintiff to defendant. The complaint demanded judgment for \$45 and costs; answer, denial and a counterclaim for \$55, but there was no demand for any judgment. Defendant submitted a bill of items for \$50. Plaintiff recovered judgment for \$48.50. Defendant appealed to County Court, the notice demanding a new trial. Plaintiff moved to dismiss the appeal because the sum for which either party demanded judgment did not exceed \$50. Motion denied and new trial had and complaint dismissed for failure to establish a cause of action against defendant.

H. H. Hustis, for applt.

W. C. Anthony, for respt.

Held, That the appeal from the order must fail because the appeal

was perfected by the service of a sufficient and regular notice of appeal, and nothing more was requisite to transfer the cause to the County Court and vest that court with jurisdiction over the same. Code Civ. Pro., § 3046. What defendant could do in the County Court after reaching there with regularity and safety is quite another question.

The demand for a new trial contained in the notice of appeal did not alone secure that remedy. The appellant was not entitled to a new trial unless the sum for which judgment was demanded by either party in his pleadings exceeded \$50. Neither party demanded judgment for a sum exceeding \$50, and defendant as a consequence was not entitled to a new trial in the County Court. Code, § 3068.

The action was for seed wheat, which plaintiff testified was sold to defendant, and that it went on his farm and was taken by his team and men. On cross-examination it appeared that it had been charged to defendant's son. On his re-direct, plaintiff testified that the accounts of the farm were kept in that way and were settled by defendant once a year; that in former years some other man occupied that house and the account with the farm was kept in the same way on plaintiff's books. He was not allowed to testify that defendant settled such accounts.

Held, Error. Unexplained, the charge tended to show that the sale was made to the son, but if the charge was made in pursuance of a purpose recognized by defend-

ant to keep the accounts of his farm separately the proof of that fact was very material and might well have afforded an explanation which would have been satisfactory to the jury, especially in view of the undisputed fact that the seed wheat was used upon defendant's farm, and the undisputed testimony of plaintiff that the sale was made to defendant.

That the granting of the motion to dismiss and refusal of permission to go to the jury were both erroneous. There was evidence sufficient to carry the cause to the jury and to have sustained a verdict in favor of plaintiff if such a verdict had been returned.

Judgment reversed, with costs.

Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

FORECLOSURE. TITLE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

August C. Bechstein v. Robert D. Schultz et al.

Decided June 18, 1887.

While an omission to publish an adjournment of a foreclosure sale is an irregularity for which the sale may be set aside on application by a party to the suit, it is not a jurisdictional defect available to a purchaser years afterward, without objection by any of the parties.

Submission of controversy without action.

Plaintiff and defendants entered into an agreement by which plaintiff was to convey certain premises to defendants and defendants agreed to accept any pay for the same. Upon a tender of the deed

defendants refused to accept it, on the ground that plaintiff had not a good and marketable title. The objection was founded on the fact that an adjournment of a foreclosure sale, under which plaintiff derived his title, was not published as required by § 1678 of the Code. Said sale was adjourned from Aug. 13 to Aug. 19, and from Aug. 19 to Sept. 2, and from Sept. 2 to Sept. 4, 1884, on which day the premises were sold. The notice of postponement and the adjournment from Aug. 13 to Sept. 2 were not published until Sept. 4, when all the adjournments were duly published. Said sale was confirmed by the court on due notice to all parties and no exceptions were made.

Linus A. Gould, for plff.

Wm. L. Snyder, for defts.

Held, That judgment should be rendered for plaintiff. Section 1678 of the Code provides that notice of the postponement of the sale of real property must be published in the paper wherein the notice of sale was published. No doubt a failure to comply with this provision is an irregularity for which the court might set aside the sale upon the seasonable application of a party to the foreclosure suit; but I do not think it constitutes a jurisdictional defect in the proceedings available to a purchaser more than two years after the confirmation of the sale without objection by any of the parties. See 102 N. Y., 165; 98 id., 665.

If such a departure from a statutory requirement as the substitu-

tion of one officer to sell in place of another by whom the sale ought to have been made does not affect the title of a purchaser, 98 N. Y., 665, still less can it be held that his title is bad by reason merely of an omission to advertise an adjournment by which neglect nobody appears to have been injured or misled, and of which there is no complaint whatever by any of the parties to the action.

Judgment for plaintiff, without costs.

Opinion by *Bartlett, J.*; *Van Brunt, P.J.*, and *Daniels, J.*, concur.

ASSIGNMENT FOR CREDITORS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

David A. Scott, respt., v. *Harrison Mills, applt.*

Decided July, 1887.

An assignment for creditors in the form of an indenture between the assignor and assignee, signed by both, contains a sufficient assent by the assignee and is valid without a separate assent by him.

Appeal from judgment in favor of plaintiff.

Action for specific recovery of personal property. One L. executed an assignment for creditors to plaintiff as assignee. The assignment was in the form of an indenture between L., party of the first part, and plaintiff of the second part, and was signed by both. Plaintiff subscribed and acknowledged no assent except such as was contained in the instrument

before it was recorded. Thereafter defendant, who was sheriff, seized the property in question under an execution against L.

Scott & Herschberg, for respt.

E. Newcomb, for applt.

Held, That the assignment was valid, and contained a sufficient assent by the the assignee under Chap. 466, Laws of 1877. An indenture is a deed between parties by which they each assume obligations to each other and become mutually bound by the terms of the instrument, and there is no reason why statute in question should be construed to contain any further requirement. No form of consent is prescribed and no place for its appearance in the assignment is designated, and the statute is fully satisfied by an appearance of assent in the instrument. In a comprehensive view, the assent of this assignee appeared in writing and was embraced in the assignment, which was subscribed and acknowledged by him. Instead of the usual deed poll of assignment in the ordinary form with the assent of the assignee endorsed thereon separately, this instrument was given the form of an indenture between the assignor and assignee. It is the act and deed of both parties and embraces the assent of both. The execution of the instrument is the assent and constitutes the acceptance of the duties imposed on the assignee thereby and an undertaking for their discharge. The trust was created by the indenture which enumerated its purposes and specified its ob-

jects. It prescribed the obligations and dictated the duties of the assignee and terminated with the words usually employed to close an instrument inter parties, as follows: "In witness whereof we have hereunto set our hands and seals." Thus the assignee assented to all the terms of the assignment and undertook the execution of the trust created thereby, and it would comport with a narrow and contracted view only to hold that an insufficient assent on his part.

Judgment affirmed, with costs.

Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Elizabeth Dodge, applt., v. *Robert Glendenning, respt.*

Decided June 18, 1887.

A cause of action for an account of moneys the proceeds of stock of plaintiff sold by defendants without her authority and one for damages sustained by such unauthorized sale cannot be united in the complaint.

Appeal from order sustaining demurrer to complaint.

The complaint alleged that defendants were stock brokers employed by her to buy and sell for her stock; that in violation of their agreement defendants sold certain stock without her knowledge; that she protested against such sale; that defendants agreed to speculate for her so as to make her loss good, which they had failed to do. As a first cause of action it asked for an accounting, and as a further cause of action

demand damages sustained by reason of the unauthorized sale, the stock having advanced thereafter. Defendants demurred on the ground that causes of action were improperly united. The demurrer was sustained.

Henry S. Bennett, for applt.

F. F. Marbury, for respts.

Held, No error. In the first division of the complaint the facts are set forth showing the sale of the stock purchased and carried by defendants for plaintiff and the moneys deposited by her with them. The sale is averred to have been without her authority, but the relief asked in the first instance is for an accounting by defendants for the money in their hands which she may be entitled to recover. Such an accounting would necessarily result in a ratification of the sale made, and preclude plaintiff from claiming any further or other relief on that account. She had her election, if the shares were sold without her authority and no satisfaction had been made to her for the loss, as the fact is alleged to be, to claim the proceeds of the sale, or to proceed against defendants for unlawfully converting her property. But as the remedies were inconsistent with each other she could not take both proceedings. If she elected, as she appears to have done in the first division of her complaint, to recover the proceeds of her property received by defendants, then the action so far would be for money had and received by them to her use, upon what the law would assume to be a promise in her favor

to make such payment to her. In the other subdivision of the complaint, which has not been stated as a part of the cause of action for an accounting, but for "a further and separate cause of action," plaintiff has set forth the facts previously averred, together with a statement of the damages sustained by her through the unauthorized and wrongful sale of the stock, and for those damages judgment has been demanded as well as for the amount which might be found due on the accounting.

These are separate and distinct causes of action not altogether growing or arising out of the transactions, the first being dependent on the waiver of the wrong, the affirmation of the sale, and the right of plaintiff to the proceeds; the other wholly on the wrong of defendants in selling and disposing of her property without her authority.

The case of *Vandevort v. Gould*, 36 N. Y., 639, in no way sustains this complaint, for the law has expressly provided in actions of ejectment that the plaintiff may also recover damages for withholding possession of the premises. The causes of action in *Barr v. Shaw*, 10 Hun, 580, were not of this inconsistent description, but were capable of being joined under the provisions contained in the Code relating to this subject.

Judgment affirmed, with leave to plaintiff to amend on payment of costs.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Bartlett, J.*, concur.

ASSESSMENTS.

N. Y. SUPREME COURT. GENERAL
TERM. FIRST DEPT.

Michael J. Daly v. Joshua C.
Sanders.

Decided June 18, 1887.

The mere setting aside of a sale for unpaid assessments under Chap. 812, Laws of 1874, does not affect the assessments themselves.

Submission of controversy.

Certain assessments for local improvements were laid on defendant's property and confirmed in 1863, 1864 and 1865. Sales of the property were made for these assessments, the two first of which were afterward set aside, but it is not stated that the orders setting them aside affected the assessments themselves. Subsequently defendant conveyed the property to plaintiff, covenanting to pay any of these assessments appearing to be liens. This submission was to determine his liability under said covenant.

Daniel Daly, for plff.

J. C. Sanders, for deflt.

Held, That what was undoubtedly designed by Chap. 312, Laws of 1874, was to direct the assessment to be vacated and set aside when any fraud or substantial error intervened in the proceedings leading to or in making the assessment. And when such fraud or substantial error appeared only in the subsequent proceedings, that the proceedings affected thereby should be set aside, and not those resulting in the assessment unaffected by any illegality or irregularity. That—taking the

whole act together and considering its subject matter—must have been the design of the Legislature; for it would be absurd to attribute the intention to be that the assessment itself might be set aside for the reason that the proceedings taken to sell the property proved to be substantially irregular or fraudulent.

The orders vacating the sales, therefore, must be considered to extend no further than they are stated in the case to have extended, and that is setting aside these two sales, leaving the assessments themselves wholly undisturbed and unimpaired in their legal force. By § 1, Chap. 381 of the Laws of 1871, it has been declared that all taxes and all assessments which theretofore had been, or should be, laid for city improvements, etc., shall be and continue to be until paid, a lien upon real estate on which they may be imposed. This act was applicable to each of these assessments and has been continued in force by § 9 15 of Chap. 410 of the Laws of 1882. This enactment seems to have been made to avoid the effect of the presumption on which the case of *Fisher v. Mayor*, etc., 67 N. Y., 73, proceeded, as it was designed, according to its express language, to continue the lien of the assessments in force until actual payment should be made of the amounts, as distinguished from a mere presumption of payment.

The sale made for the assessment of 1865 has at no time been set aside, neither have the proceedings through which the assess-

ment was made been questioned or in any manner vacated. When the sale was made by § 10 of Chap. 381, of the Laws of 1871, it was made lawful for the Clerk of Arrears to bid in for the Mayor, etc., every lot for which no person should offer to bid. As to the assessment of 1865, there appears to be no fraud, substantial error or irregularity in any respect, and by the sale the Mayor, etc., acquired a right to this property, which can only be divested in the manner pointed out in the statute.

Judgment for plaintiff declaring the liability of defendant under the covenant for the payment of the assessments of 1863 and 1864 and for the redemption from the sale made for the non-payment of the assessment of 1865, without costs.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Brady, J.*, concur.

DEED. EASEMENT.

N. Y. COURT OF APPEALS.

Avery, respt., v. The N. Y. C. & H. R. RR. Co., applt.

Decided June 7, 1887.

The owner of a hotel conveyed certain land adjoining to a railroad company for a depot, the intervening strip being designated as a street, but it was never accepted by the authorities. Subsequently two of his heirs conveyed half of said strip to said company by deed which provided that the company should maintain an opening opposite to the hotel for passage of passengers and their baggage. Plaintiff leased the hotel and defendant built a fence obstructing all passage to the hotel. *Held*, That the condition as

to an opening was a covenant running with the land and that such covenant makes the right of access and transit across said strip an easement appurtenant to the hotel and that plaintiff as lessee could maintain an action to restrain defendant from continuing said fence, but that the judgment should provide simply for an opening of the proper size and large enough for the convenient access of passengers and their baggage.

This action was brought to restrain defendants from continuing a fence. It appeared that in 1884, one W. owned certain premises in Buffalo, part of which was occupied as a hotel, and which were divided from defendant's premises by a strip of land thirty feet wide running east and west 240 feet, thence north about 100 feet. In 1844 W. conveyed a portion of said premises opposite the hotel to defendant's predecessor for a passenger and freight depot and for no other purpose, and in the deed described the above mentioned strip of land thirty feet wide as dedicated for a public street. This dedication never took effect, it never having been accepted by the public authorities. W. died in 1850, and in 1853, a partition of the hotel property was made among his four heirs. This partition did not include the strip of thirty feet. Two of the heirs became owners of the hotel property and in 1857, conveyed by quitclaim deeds to defendant's predecessor an undivided one half of that portion of the strip in question and adjoining the lands of said predecessor theretofore conveyed to it by W. These deeds provided that the RR. Company, its suc-

cessors or assigns, should at all times maintain an opening into the premises conveyed opposite the hotel for the convenient access of passengers and their baggage to and from the premises conveyed, which opening should at no time be closed against such passengers and their baggage. It appeared that the hotel property was accessible from defendant's depot and, that it was dependent largely for its patronage and custom upon the passengers arriving at and departing from such depot. In May, 1881, the hotel premises were leased to plaintiff and in Aug., 1881, defendant built a fence obstructing all passage to and from the hotel property to and from its depot.

George C. Greene, for applt.

Truman C. White, for respt.

Held, That by the failure to accept the street dedicated as a highway the thirty feet in question remained the property of W. and descended to his devisees; that one-half of the interest of such devisees in twenty feet of said strip was conveyed by the quitclaim deeds to the railroad company; that plaintiff as lessee of the grantors cannot question the validity of said deeds; that said grantors must be regarded as abandoning all claim to said strip as a public street or highway; that the condition of the deeds as to an opening in the fence and access to said twenty feet must be considered as a covenant running with the land and in favor of those having a legal interest in the hotel lands and that such covenant

makes the right of access and transit to and across said strip of twenty feet a right or easement appurtenant to the hotel premises and that plaintiff as lessee of such premises could maintain this action. 5 Wall., 119; 16 Abb. N. C., 110.

When the case came on for trial defendant's counsel moved to dismiss the complaint because so far as the complaint showed the plaintiff was an entire stranger to the whole matter, the only allegation on that subject being that he was in the possession of the premises and as he did not appear as party or privy to any covenant or provision. Plaintiff then moved to amend by setting up his lease from the owner. This was objected to by defendant's counsel as setting up a new and distinct cause of action, one which was on contract or covenant and could not be joined with an action for damages or nuisance. The objections were overruled.

Held, No error. The judgment provided for a full and entire destruction of the fence erected by defendant.

Held, Error; that it should have provided simply for an opening of a proper size opposite the hotel and adjacent to the premises conveyed by the deeds and large enough for the convenient access of passengers and their baggage to and from said strip of land.

Judgment of General Term, affirming judgment for plaintiff, reversed, and new trial granted.

Opinion by *Peckham, J.* All concur.

FIRE INSURANCE. PRAC-
TICE.

N. Y. SUPREME COURT. GENERAL
TERM. FIRST DEPT.

Ephraim Karelson et al., *appls.*,
v. The Sun Fire Office of London,
respt.

Decided June 18, 1887.

Under a simple denial of an allegation of partnership a defendant cannot claim that there were other parties interested in the firm who should be parties plaintiff.

Though proofs of loss may be fatally defective in that they do not accord with the terms of the policy, yet if the proofs are retained by the company, with no notice of their insufficiency as to particular omissions or defects, but only a notice that the company has not waived and does not and will not waive anything, and expressly reserves any and all objections to any and all claims that have been or may be made made by the insured against the company, there was an implied waiver of the conditions.

Appeal from judgment dismissing complaint.

Action upon a policy of fire insurance. The answer among other things denied the alleged copartnership of plaintiffs. On the trial defendant claimed that other persons were interested in plaintiffs' partnership who should be parties.

Adolph L. Sanger, for *appls.*

C. B. Alexander, for *respt.*

Held, Untenable; that under a simple denial of an allegation of partnership, the defendants cannot claim that there are other persons interested in the firm who should have been made parties plaintiff.

The proofs of loss do not accord with the terms of the defendants'

policy as set forth in the complaint, among other things in that they were not signed by the plaintiffs or either of them, nor were they verified by their oath or affirmation. They were retained by defendant, and seven days thereafter its manager sent a letter to plaintiffs which, without admitting anything stated that the company has not admitted any liability whatever for or on account of said alleged loss, or the validity of any claim made therefor, nor the correctness of any statement in said papers (referring to proofs of loss) contained. That his company has not waived and does not and will not waive anything, and expressly reserves any and all objections to any and all claims that have been or may be made by you or on your behalf against his company for and on account of said alleged loss.

Held, That the irregularity in the proofs was waived.

If defendants desired to object to the form of the proofs of loss they were bound to give notice to that effect, so that they might be corrected. This course, which ordinary fairness would seem to have dictated, defendants carefully avoided doing, and by their letter of Sept. 22 they seem to have desired to mislead plaintiffs as to the grounds of their refusal to pay, while endeavoring to retain any other objection which the ingenuity of their manager might subsequently discover. The loss was disputed upon the ground that no contract of insurance existed, and to that point was the

attention of plaintiffs directed, and as the proofs of loss were retained and no complaint made as to any particular omission or defects in the proofs of loss, plaintiffs had the right to assume that the contention was as to the fact of the existence of the contract of insurance. 80 N. Y., 112; 100 id., 411.

Under this condition of the evidence, it seems to have been error to have dismissed plaintiffs' complaint upon the ground that the proofs of loss were insufficient.

Judgment reversed and new trial ordered, with costs to appellants to abide the event.

Opinion by *Van Brunt, P. J.*; *Brady* and *Daniels, JJ.*, concur.

NEGOTIABLE PAPER. BANKRUPTCY.

N. Y. COURT OF APPEALS.

The Jefferson Co. Nat. Bk., *respt.*, v. Streeter, *applt.*

Decided June 7, 1887.

Defendant was indorser of a note on which plaintiff recovered judgment against the makers by default and had execution issued and levied. The makers were adjudicated bankrupts and the sheriff enjoined. Plaintiff consented to the appointment of the sheriff as receiver and an order directing a sale of the property levied on, the lien to attach to the proceeds. Subsequently it was adjudged that plaintiff's judgment was void as to the assignee as a fraudulent preference. *Held*, That defendant was not prejudiced by the action of plaintiff in the bankruptcy proceeding and that the consent of plaintiff was not a defense to an action against defendant.

This was an action upon three promissory notes made by C. &

Co., and indorsed by defendant S. It appeared that the notes not being paid at maturity they were duly protested and notice given to defendant. Plaintiff obtained a judgment against the makers on default, the summons having been personally served. Execution was issued and a stock of goods levied on. On the same day a petition in bankruptcy was filed against C. & Co. and subsequently plaintiff and the sheriff enjoined from selling the property levied upon. C. & Co. were afterward adjudged bankrupts and an order was made by the Bankruptcy Court, plaintiff's attorney having consented, appointing the sheriff special receiver of the bankrupts' property and directing him to sell the property levied on and bring the proceeds into court subject to its further order. The order also provided that the lien of the judgment creditors should not be affected thereby, but that it should "follow and attach to the moneys arising from the sale." In an action subsequently brought by the assignee in bankruptcy it was adjudged that plaintiff's judgments were void as against such assignee and that the latter was entitled to the fund, the proceeds of the goods sold by the sheriff under the order of the Bankruptcy Court. The judgments and executions were set aside as a fraudulent preference not on the ground of any actual fraud on the part of the bank or its officers but for the constructive fraud growing out of the fact that its attorney who procured the judgments had notice of

the insolvency of C. & Co. at the time of commencing the actions and designed thereby to obtain a preference.

D. O'Brien, for applt.

John Lansing, for respt.

Held, That plaintiff was not debarred from proving its debt before the assignee as the obtaining of the judgments and the levy upon the property of the bankrupts under the executions was a conveyance, sale, assignment or transfer of the property of the bankrupts within § 39 of the Act of 1867. The defendant was not prejudiced by the act of the bank in its dealing with C. & Co. and it did not thereby preclude itself from proving its debt against the estate of C. & Co. in bankruptcy, nor interfere with the right of the defendant as indorser. The consent of the bank to the order of the District Court appointing the sheriff special receiver and directing a sale of the goods levied on is not a defense. The order preserved the lien of the execution, if any, and transferred it from the goods to the proceeds. No lien was acquired as against the assignee in bankruptcy. The judgment of the Bankrupt Court was conclusive upon the bank and the question was not open for contest by the defendant.

The amendment of § 39, of the Bankrupt Act of 1867, made in 1874, which section relates to the proof of debts by creditors who had obtained a fraudulent preference was intended to mitigate the harshness of the rule prescribed in the original section, which prohib-

ited a creditor who had obtained a preference in fraud of the act from proving his debt although he had been deprived of the benefit of the preferential provision, and to confine the prohibition to cases of actual as distinguished from constructive fraud, and even in cases of actual fraud to limit the penalty of the fraud to a denial of the right to prove the debt as to a moiety only. 17 N. B. R., 399; 16 id., 569; 18 id., 85; 19 id., 283; 12 id., 211; 3 Fed. Rep., 798; 17 id., 693.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Andrews, J.* All concur.

MUNICIPAL CORPORATIONS. ORDINANCES.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The people, *respts.*, v. *Jeremiah J. Mattimore*, *applt.*

Decided July, 1887.

An ordinance of the city of Albany, made under Chap. 298, Laws of 1883, title 3, §§ 14-25, requiring owners to clear snow and ice from their side-walks by a certain hour, does not conflict with the provisions of title 9, §§ 23 to 28 of said act which make it the duty of the chief of police to regulate the cleaning of streets and side-walks.

A municipal corporation under the part of general power to make police regulations can require the citizens to exercise their rights of property in such a manner as to prevent its becoming pernicious to the citizens generally.

Defendant was convicted in the Police Court of the city of Albany, for failure to clear the snow and

ice from the sidewalk in front of a lot which he owned and occupied. By title 3, § 14 of the charter of Albany, Chap. 298, Laws of 1883, the common council has power to make laws and ordinances such as may be necessary to carry into effect all powers vested in or conferred upon the corporation, and among other powers to regulate the use of streets, also to regulate the cleaning of streets and sidewalks and the removal of ice and snow therefrom; also to order and direct the clearing of streets from snow within such time as the city shall deem proper. The city passed an ordinance under which the conviction was had. It is claimed that the provisions of the charter contained in title 9, §§ 23 to 28 conflict with the ordinance; these make it the duty of the chief of police to regulate the clearing of the streets and sidewalks from dirt, ice and snow. If the occupant does not do the work the chief of police or the contractor is to have it done and the owner or occupant must pay the expense; if he fail to pay the owner is to be arrested and fined not less than the cost of the cleaning.

Mark Cohn, for applt.

Hugh Reilly, Dist. Atty., for resp't.

Held, That the conviction was proper. A comparison of the ordinance and the charter will show that the ordinance requires the owner to clear off the snow and ice "so as to allow of the citizens using the sidewalks in an easy and commodious manner." The charter says this clearing is to be

done "in such manner and at such times as may be prescribed by the chief of police." The extent of the requirement in the first case is the "easy and commodious use;" in the second case it is "as prescribed by said police." In the former case the owner is liable to a fine for neglect; in the latter he is liable to a fine if he fail to pay the expense. The ordinance was evidently intended to refer to sidewalks, the charter to sidewalks and streets. The ordinance relates to snow and ice, the charter provisions to the whole year. The ordinance should be construed as supplying an obvious deficiency in the police regulations and as such is valid. 15 N. Y., 502; 35 Alb. L. J., 319.

Conviction and judgment affirmed.

Opinion by *Landon, J.*; *Bockes, J.*, concurs.

GUARDIAN. CONSTRUCTION OF WILLS.

N. Y. SURROGATE'S COURT.

In re estate of Ella S. Flagg, deceased.

Decided Aug. 24, 1887.

A general guardian, although he gave security upon qualifying as such, must give another bond as required by § 2746 of the Code, before he can obtain possession of his ward's estate.

The provisions of a will and codicil construed upon facts stated below.

By the first clause of her will testatrix gave her husband certain jewelry and wearing apparel; by the second the sum of \$1,700 absolutely saying "this sum he gave

to me and I do not consider it a part of my estate," and she also gave the sum of \$2,000 absolutely. By the third clause of her will she gave to her executors \$8,000 in trust to receive and pay the income thereof to her husband as long as he should live and at his death the principal sum of \$8,000 she bequeathed to her children.

The will further by the sixth clause provided that in case her husband should be living at the time her son Herbert attains his majority, she directs her executors to take \$10,000 out of the principal of her estate, then held in trust for her child's benefit and directs them to invest the same, and collect and pay the interest and income thereof semi-annually to her husband as long as he should live, and directs the principal sum on his death should be given to the child or children and the lawful issue of any deceased child or children of the testatrix then living.

By the codicil to her will, the testatrix states: "I hereby revoke any bequest of money or interest of money made in my last will and testament to my husband James H. Flagg, *excepting*, the interest at 6 per cent. of \$10,000 during his lifetime, and the sum of \$2,000 which as I have stated in my will I consider a gift from him and therefore I do not include in my estate."

Richards & Brown, for executors.

Frank P. Slade, for James H. Flagg.

Held, It was the intention of the testatrix in using the words

following the word "excepting" to take out of the operation of the revocation provision, and to sanction anew as effective dispositions, two of the gifts which she understood to have been bequeathed by her will. In using the words "interest at 6 per cent. of \$10,000 during his lifetime, she intended to refer to the bequest of" the interest and income of \$10,000 which the will gives her husband, in case he shall be living when her son Herbert shall become of age.

The codicil revokes all the provisions of the will in his favor, except the one above indicated and the one which bequeaths a \$2,000 legacy, but was not intended to revoke the provisions of the will in his favor *in toto* and substitute the words after the words "excepting" in codicil as a new and substantial bequest.

Held, Further that the guardian of the infant, although he gave security in Kings County on his appointment and qualification in Kings County, he must execute and deposit a bond, in pursuance of § 2746 of the Code of Civ. Pro., before he can obtain possession of his ward's estate. *Reick v. Fish*, 1 Dem., 175.

Opinion by *Rollins, S.*

DEEDS.

N. Y. COURT OF APPEALS.

Thomas et al., respts., v. Evans et al., appls.

Decided June 7, 1887.

Testator devised certain property to his wife for life with remainder to his chil-

dren, the will giving the executors a power of sale. The widow married one E. who made improvements to the land. The executors sold two lots for more than their value to one S., who built thereon and sold to E., who made other improvements. In an action by the children to set aside the deeds. *Held*, That if they could establish a right to the property they would only be entitled to judgment therefor on condition of refunding to E. the amount originally paid by him and the value of the improvements to the extent they have added to its permanent value.

This was an equitable action, to set aside a deed to certain real estate as invalid. It appeared that in July, 1841, one T., died leaving a widow and four children who were infants. He owned eight lots in the city of W., and by his will he devised said property to his wife for life with remainder to his children. He appointed his wife executrix of his will and guardian of the children. He authorized his executors to "sell the whole or any part of his real estate when they may deem best for those interested therein, either at public or private sale and invest the proceeds in bonds and mortgages, or other securities as they may believe best." In Dec., 1841, the widow intermarried with the defendant E. and lived with him as his wife until 1878, nearly twenty years after the youngest child had come of age. Between 1841 and 1850 E. made considerable improvements to the property. In 1853 the executors sold and conveyed two of the lots which were vacant and unimproved to one S. for \$1,000 and a release by E. of money advanced

by him at the request of the executors to pay assessments for municipal improvements for the whole property. The price received was more than the value of the lots. On receiving his deed S. executed a mortgage for \$4,500 upon the lots to third parties, which sum was wholly expended in erecting buildings thereon. In 1856 S. conveyed the property to E. receiving in payment therefor about \$7,000. E. placed the deed on record and from that time forward claimed to be the absolute owner of the property and made valuable improvements thereon, all of which was done with the knowledge and acquiescence of the life tenant. This action was brought in 1881 by the children of T. after the death of their mother, and more than twenty years after the youngest had become of age to have the deed to S. set aside, and all subsequent conveyances declared void and the property adjudged to belong to them.

George H. Starr, for appls.

William G. Cook and *William C. Wallace*, for respts.

Held, That even if plaintiffs should establish an equitable right to the property it would not entitle them to judgment therefor, except upon condition of refunding to E. the amount originally paid and the value of the improvements to the extent that they have added to its permanent value 16 N. Y., 246; 11 Paige, 484; 30 Bev., 363; 1 John. Ch., 385; 3 Brad., 359; 56 N. Y., 615; 6 Paige, 390; 17 N. Y., 86; 1 Story, 478; 10 How. Pr., 51; 50 N. Y., 339;

Pomeroy's Eq. Jur., § 1242, note; 102 N. Y., 135.

Also held, That in case E. is charged with rents received from the property since the death of the life tenant, he should be allowed interest on the amount payable to him.

Judgment of General Term, modifying interlocutory and final judgment for plaintiffs, reversed, and new trial ordered.

Opinion by *Ruger Ch. J.* All concur.

SUBSCRIPTION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The Presbyterian Church of Albany, *respt.*, v. Thomas C. Cooper, admr., et al., *appls.*

Decided July, 1887.

Where one signed a subscription paper to pay off a debt upon a church which paper was on the express condition that the whole should be paid or subscribed within a year. *Held*, That in the absence of any evidence of estoppel the subscriptions made must be valid in law.

Subscriptions by the "Ladies Association," the "Young Men of the Church" and the "Sunday-school," none of the three bodies being incorporated, are invalid and cannot be enforced.

Part payment by the intestate of his subscription in his lifetime held to be of no force, in the absence of any evidence that the part payment had any effect upon the action of the church.

Thomas Crook a member of plaintiff signed to the amount of \$5,000 a subscription paper to pay off a mortgage debt on a church of \$45,000. This paper contained an express condition that it should not be binding unless the full sum

of \$45,000 should be subscribed or paid in within a year. In his lifetime he paid \$2,000. This action is for the balance. It appeared that before his death about \$11,000 had been actually paid; that he was active in raising money and that with his approval \$10,500 of the money paid in was expended in reduction of the mortgage. All the money was subscribed provided the subscriptions were valid. The referee held that they were. The administrators appeal.

Ward & Cameron, for applt.

Matthew Hale, for respt.

Held, Error. Valid subscriptions were plainly contemplated as a condition precedent to absolute liability. 31 N. Y., 273. Whatever Crook might have done voluntarily his representatives can only do what is within the law. The sum of \$5,000 was subscribed by the "Ladies Association." These ladies had no actual organization such as is required to make them capable to contract, and their president who wrote the name of the association upon the paper had no authority to bind any one but herself and this she did not do. The resolution of the "Young Men of the Church" to raise \$1,500 by entertainments is for the same reasons invalid. The subscription of \$500 "Sunday-school by R. F. Todd" is not binding. Mr. Todd did not bind himself. He assumed to be the agent of a Sunday-school which as a school could not bind itself by any form nor by an agent it might employ. In *Union Hotel Co. v. Hersee*, 79 N. Y., 455, the agent represented

himself to hold power which he had not to bind a principal existing and who could bind himself. That was not so in this case.

There is no estoppel. There is no evidence that Crook's part payment had the effect to make plaintiff relax any effort or to incur any obligation or to do or omit anything to its prejudice. In 46 Barb., 35, and 17 How. Pr., 287, plaintiff at defendant's request did acts which would be to plaintiff's prejudice if the subscriptions were declared invalid.

Judgment reversed.

Opinion by *Landon, J.; Learned, P.J., and Bockes, JJ.*, concur.

RAILROADS. NEGLIGENCE.

N. Y. COURT OF APPEALS.

Morris, respt., v. The N. Y. C. & H. R. RR. Co., applt.

Decided Oct. 4, 1887.

Plaintiff was injured by a parcel falling from a rack above his seat. *Held*, That defendant was only required to exercise reasonable care according to the circumstances of each case to prevent accidents of this nature, and that there being nothing extraordinary about the parcel or its position in the rack to attract attention to it the failure of the train hands to order its removal was not negligence.

This action was brought to recover damages for injuries received by plaintiff in consequence of the falling upon him of a clothes wringer from a rack above the seat in which he was sitting in one of defendant's passenger cars. The complaint alleged that the rack was defectively constructed

and insufficient, and that it was negligence on the part of defendant in receiving the clothes wringer into the car. There was no proof that the car or the rack in question was insufficient. The wringer was proved to have been wrapped up in paper, but there was no evidence that any of defendant's employees saw it put in the rack or knew of its being put there, or that its apparent character in bulk or weight was such as reasonably to attract the attention of the defendant's employees to it. It was observed by plaintiff in the rack at the time he took the seat. A motion for a nonsuit was denied.

Matthew Hale, for applt.

Andrew Hamilton, for respt.

Held, Error; that there was not sufficient evidence to warrant the submission of the question of defendant's negligence to the jury.

In looking out for danger arising from accidents of a similar character, carriers of passengers are not to be held to the exercise of the highest care which human vigilance can give, reasonable care, to be measured by the circumstances surrounding each case, to prevent accidents of this nature is all that is demanded.

Also held, That as there was nothing extraordinary about the parcel, or its position in the rack, and nothing to attract particular attention to it, the failure of the train hands to notice it or to order its removal was not negligence.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed, and new trial ordered.

Opinion by *Peckham, J.* All concur, except *Danforth, J.*, dissenting.

LIFE INSURANCE. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Samuel N. Bacon, *applt.*, v. The U. S. Mutual Accident Assn. of the City of New York, *respt.*

Decided May, 1887.

Respondent issued an application and certificate of membership which provided that for it to be held the member must have sustained bodily injuries effected through external, violent and accidental means and that such injuries alone should have caused death; also that there must be an external and visible sign of such injuries; also that it was not to be liable for death by disease or by poison in any form or manner. The deceased died of malignant pustule which is caused by the deposition by flies or otherwise of putrid matter, found on cattle and hides, upon thin or abraded skin. He had been employed in a meat market and at a station where cattle and hides were shipped. There was no direct evidence of how the pustule was caused. *Held*, That a non suit was error.

Action to recover upon a certificate of membership issued by respondent and a verdict was directed in its favor. The respondent is conducted on the co-operative or assessment plan under the laws of New York. The application and the certificate of membership constitute the contract. The certificate required proof that the member had "sustained bodily injuries effected through external, violent and accidental means," and that "such injuries alone shall have occasioned death within

ninety days from the happening thereof." It also provided that its benefits should not extend to any bodily injuries of which there should be no external and visible sign nor to death by disease or by poison in any form or manner.

The deceased died of malignant pustule. He went to Council Bluffs, where there were cattle yards, in Feb., 1884, and worked in a meat market and afterward in a railroad office where hides and cattle were received to a considerable extent. He died March 21. There was no conflict of medical testimony. A physician testified that he died of malignant pustule; that this was caused by depositing putrid matter upon an abraded part of the body. This putrid matter was found upon hides and cattle. It might be deposited by flies or by touching the abraded part with the matter or even may be absorbed where the skin is very thin. The pustule occurred most frequently on the lips, which was the case with deceased.

G. L. Stedman, for *applt.*

Wm. Bro. Smith, for *respt.*

Held, That the direction of a verdict was error. The case should have gone to the jury. We do not think the death was caused by poison or the taking of poison, as those phrases are commonly understood. No poison was taken internally. And although the deceased died of blood poisoning that is not poison as that word is ordinarily used.

The direct cause of the pustule was not shown, but deceased was employed about cattle and hides

from Feb., 1884, and we think there was evidence to go to the jury on the question whether the cause arose within ninety days of his death.

The pustule upon his lip was an "external and visible sign" of the injury. The means through which death was caused were external. Upon this point the physician's testimony was positive. The cause was external as much as the bite of a snake. 22 Hun, 187.

The means were accidental. It is too improbable to suppose that the deceased intentionally put upon his lip his hand infected with putrid matter in order to produce death. 47 N. Y., 53; 69 Penn. St., 43.

The most difficult question is whether the means were violent. The exact means we do not know. But the certificate throws some light on what is meant by "violent." It says no claim can be made where death has been caused by lifting, over-exertion, sunstroke, or freezing. It is fair to infer that if these had not been excepted they would have come within the word "violent." But sunstroke and freezing impart no physical violence any more than does drowning. 6 Hurl. and Norm., 845. We say a man dies a violent death without meaning more than that he did not die in an ordinary way. And if there must be violence, how great must it be? A poisoned arrow may make a small wound and the bite of a rattlesnake may be hardly perceptible, but if they produce death are they not violent? In this case there was an external,

accidental cause and not an internal disease manifesting itself externally. We think that plaintiff should not have been non-suited.

Judgment reversed.

Opinion by *Learned, P.J.*; *Landon* and *Mayham, JJ.*, concur.

PROBATE OF WILL.

N. Y. SURROGATE'S COURT.

In re estate of Sarah A. Peck, deceased.

Decided Oct., 1887.

Where a will has been prepared or procured by one interested in its provisions, an additional burden is imposed upon those who seek to establish it; the circumstance is regarded by the court with suspicion and jealousy, and there must be stronger proof than would else be required that the paper propounded expresses the free, unbiassed testamentary purpose of the alleged testator, and not merely the wishes of the interested beneficiary. Moreover, the existence of a confidential relation, such, for example, as subsists between physician and patient, implies itself peculiar opportunities for the exercise by the former over the latter of influence and authority, so that if he has been instrumental in procuring from his patient a will containing provisions greatly to his advantage fraud and undue influence will readily be inferred unless all jealous suspicion is put to rest by satisfactory testimony.

This decedent, who was a resident of the city of New York, died on the 31st of Oct. last, leaving as her surviving next of kin and heirs-at-law a sister of the whole blood, a brother and a sister of the half blood, three nephews and two nieces.

On the day following her death, Dr. Ebenezer B. Belden propounded for probate in this court a paper

purporting to be her last will and testament.

No one of decedent's relatives, near or remote, is named in this instrument as a beneficiary; if it is in truth her will, her entire estate, which is admittedly of very considerable value, is now the property of the proponent, and its administration must be committed to his hands as sole executor.

All the heirs-at-law and next of kin of the decedent have appeared in opposition to the proponent's claims, and insist that upon his own showing—for he has rested his case—his petition for probate should be denied.

It is not disputed that for many years prior to the execution of this paper the proponent and decedent sustained to each other the confidential relation of physician and patient; nor is it disputed that the proponent was directly instrumental in procuring the paper to be executed.

Its two subscribing witnesses are George Holl and Dr. John E. Stillwell. The latter acted as witness upon the express request of the proponent, and, upon a like request, invoked the services of his associate, Mr. Holl. Dr. Stillwell was at the time (June, 1882,) employed as an assistant in Dr. Belden's office and the two subsequently became partners.

As to the origin of this alleged will the evidence is utterly silent. There has been no proof of instructions and no production of a draft; the proponent has not undertaken to show by whose hand the paper was written, or to controvert the

evidence strongly tending to show that the handwriting is his own.

Dr. Stillwell's testimony in this regard is as follows: He said at first that the handwriting of the alleged will bore a resemblance to Dr. Belden's, and might be his, though he believed the contrary. He subsequently testified, after further scrutiny, "I believe it is in the handwriting of Dr. Belden." Upon the production of a paper written by the proponent in court and containing his signature, and a copy of a portion of the instrument in controversy, Dr. Stillwell said, in answer to a question whether he adhered to the belief that that instrument was in Dr. Belden's hand, "There are remarkable points of resemblance, but I cannot determine."

Birdseye, Cloyd & Bayliss, for proponents.

S. F. Kneeland, for contestant Morris.

N. B. Sanborn, for Polhemus and others, contestants.

Held, The conviction is forced upon me by Doctor Stillwell's testimony and the proponent's silence, together with a comparison between the will and the piece of handwriting which is admittedly the proponent's own, that the two pieces of handwriting is the work of the same hand.

The fact, too, that the proponent stands before the court, not as admitting that this alleged will was written by himself, but claims, through his counsel that the evidence will not warrant such conclusion, is a fact, to my mind, of gravest importance, in view of the

doctrine which may be stated thus: Where a will has been prepared or procured by one interested in its provisions, an additional burden is imposed upon those who seek to establish it; the circumstance is regarded by the court with suspicion and jealousy, and there must be stronger proof than would else be required that the paper propounded expresses the free, unbiased testamentary purpose of the alleged testator, and not merely the wishes of the interested beneficiary. Moreover, the existence of a confidential relation, such, for example, as subsists between physician and patient, implies of itself peculiar opportunities for the exercise by the former over the latter of influence and authority, so that if he has been instrumental in procuring from his patient a will containing provisions greatly to his advantage, "fraud and undue influence will readily be inferred unless all jealous suspicion is put to rest" by satisfactory testimony. Schouler on Wills, 256; Newhouse v. Godwin, 17 Barb., 230; Barry v. Butlin, 1 Curt., 637; Barker v. Batt, 1 Curt., 135; Wilson v. Moran, 2 Brad., 172; Ingram v. Wyatt, 1 Hag. Ecc., 384; Crispell v. Dubois, 4 Barb., 393; Finne v. Johnson, 60 Barb., 69; Post v. Martin, 91 N. Y., 539; Trumbull v. Gibbons, 32 N. J. Law, 117; Boyd v. Boyd, 66 Penn. St., 283; Darling v. Loveland, 2 Curt., 225.

Now, the suspicions of undue influence and fraud excited by the testimony upon which I have thus far commented have not been re-

moved, but on the contrary have been greatly strengthened by other portions of the evidence. I do not deem it necessary to review that evidence in detail.

It shows that the decedent was of doubtful testamentary capacity at the time with which we are here concerned; that, in the judgment of Dr. Stillwell, she was then near the border line between sanity and insanity, and passed that line soon afterward; that she "demurred" when Dr. Belden's assistant asked her to execute this pretended will, and said that before signing she wanted time to consider because its provisions were not quite to her liking; that she repeated her demurrer when for certain reasons assigned by Dr. Stillwell he repeated his request. It *fails* to show who originated this will; whether or not the decedent ever gave instructions regarding it; where it has been since it came into being; how it fell into the possession of the proponent himself.

The paper is not deserving of probate.

Opinion by *Rollins, S.*

PLEADING. LIMITATION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Catherine A. Hedges, *respt.*, v. Abraham B. Conger, *applt.*

Decided June 18, 1887.

The objection that the action is barred by the statute of limitations cannot be taken by demurrer.

Appeal from interlocutory judgment overruling demurrer.

This action was brought in Jan., 1886, by plaintiff as assignee of the judgment creditors to recover on thirty-six judgments recovered against defendant in 1876, 1877 and 1878; fourteen of them having been recovered in justice's court. Defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled. The appeal is from so much of the judgment as permits judgment to embrace the justice's judgment.

Robert Sewell, for applt.

Irving Brown, for respt.

Held; No error. Plaintiff has brought the action as the assignee of the judgments, and not being an original party in the actions in which they were recovered she has not been precluded by § 1913 of the Code Civ. Pro. from maintaining an action upon the judgments without first securing leave of the court to commence and prosecute it. One of the grounds taken in support of the demurrer is, that the action, in part at least, has been barred by the statute of limitations. But this objection cannot be taken by demurrer. For by § 413 of the Code it has been provided that the objection that the action has not been commenced within the time limited can be taken only by answer.

Furthermore, the action has been commenced on the judgments in the Supreme Court within the time provided by law, for they were not recovered earlier than the year 1876, while the action was commenced in Jan.,

1886. And as plaintiff is entitled to maintain the suit upon these judgments certainly, even if she may fail as to those recovered in courts not of record, her complaint does contain facts sufficient to constitute a cause of action. If there are defenses to either of these judgments they must be interposed by way of answer.

Judgment affirmed, with leave to defendant to answer, etc.

Opinion by *Daniels, J.*; *Brady* and *Bartlett, JJ.*, concur.

APPEAL.

N. Y. COURT OF APPEALS.

Hyatt, rec'r., respt., v. Dusenbury et al., appls.

Decided June 28, 1887.

D. conveyed certain property through a third person to his wife, who executed a mortgage to one M and one to C., who assigned it to D. as administrator of one A. The first mortgage being foreclosed left a surplus, but not sufficient for payment of the second. On appeal from an order on distribution thereof, *Held*, That the conveyances and mortgage being valid as between the parties thereto, in case the order could be reversed the surplus would belong to D. as administrator, and the other parties not being aggrieved could not appeal.

This was a motion to dismiss an appeal from an order made on the distribution of surplus moneys arising upon a foreclosure of a mortgage.

It appeared in June, 1884, defendant W. D. owned certain real estate, and conveyed the same to defendant H., his wife's brother, who in the same month conveyed the property to T. D., wife of said

W. D. In July, 1884, T. D. at the request of W. D. executed a \$9,000 mortgage on said premises to one T. M. In Jan., 1887, T. D. executed a mortgage of \$7,000 to one C., one of her husband's workmen, who at once assigned it to W. D., as administrator of A., but the latter did not record the assignment until Sept., 1885. The conveyances of June, 1884, and the mortgage to C. were attacked as fraudulent, in this action, which was begun in March, 1885, by plaintiff as receiver of W. D. a judgment debtor. At that time the mortgage of \$9,000 to T. M. had not been foreclosed, and C. was by the record the holder of the \$7,000 mortgage, and T. D. the owner of the equity of redemption subject to plaintiff's rights. W. D., T. D., H. and C. were made defendants. In Dec., 1885, the case was tried. At that time the \$9,000 mortgage had been foreclosed, and there was a surplus of \$2,397.81, being less than half the amount due on the C. mortgage. T. D. testified that she executed the C. mortgage at the request of W. D. "without knowing anything about it," and W. D. testified that the full amount of the C. mortgage was due the estate of his, A., intestate at the time of its execution. On Feb. 19, 1886, plaintiff had judgment directing his claim to be paid from the surplus. On Dec. 2, 1885, W. D. as administrator of A. filed a claim to the whole of the surplus. On motion for a reference as to the surplus moneys W. D. requested an adjournment pending

an appeal the other defendants had taken to the General Term, but the Court refused to permit such an adjournment unless W. D. would stipulate that his claim should abide the result of said appeal. On March 20, 1886, he so stipulated, and on April 5, 1886, an order of adjournment to May 8, 1886, was entered on said stipulation.

A. Walker Otis, for motion.

Moody B. Smith, opposed.

Held, That the conveyances of June, 1884, and the second mortgage and assignment thereof being valid as between the parties thereto, in case the judgment could be reversed the surplus money would belong to W. D. as administrator of A., and would have to be refunded to him, and as none of the other defendants would be entitled to it they are not aggrieved by the judgment and cannot appeal therefrom. Code, § 1294. W. D. as administrator of A. is the only person interested in prosecuting the appeal and as he has not appealed and is so bound by his stipulation that he cannot, the motion should be granted.

Per curiam opinion. All concur.

ABATEMENT OF LEGACIES.

N. Y. SURROGATE'S COURT.

In re estate of Peter Morris, deceased.

Decided Oct., 1887.

In case the testator's estate is insufficient to pay all the legacies in full they must abate *pro rata* in the absence of any provision of the will showing an intention on the part of the testator to give one legatee preference or priority over the others.

The third article of this testator's will is in substance as follows: I give to my executors \$45,000, in trust, to invest the same, and keep the same invested, and to apply the income thereof to the use of my wife for her natural life; and, after her death, I give the sum of \$35,000, part of said \$45,000, to my son, John H. Morris, and I authorize and direct my executors to collect and apply the net income of \$10,000, the balance of said \$45,000 to the use of my sister-in-law, Elisa P. Dykman, for her life; and, after her death, I give the said \$10,000 to my said son John H. Morris.

The fourth article bequeaths a legacy of \$1,000 to the testator's widow and divers other pecuniary legacies to persons therein specified.

Article nine declares that "*the above bequests for the benefit of my wife* are not to be diminished in case my estate shall not be sufficient for all the devises and bequests of this will, but are first to be provided for, and are upon condition that she accept the same in lieu of all dower and right of dower and other claims upon my estate."

By the instrument, as a whole, he undertook to dispose of \$86,000. Of this sum he directed that the executor should hold in trust for the widow, as above stated, the sum of \$45,000; that he should hold the further sum of \$18,000 in trust for other beneficiaries, and should pay the sum of \$23,000 to legatees.

It appears by a statement of facts to which all persons inter-

ested in the present accounting proceeding have agreed, that the assets which have come to the hand of the executor have never been sufficient even to satisfy the trust provisions for the benefit of the testator's widow. She died in May last, having been in receipt since her husband's death of the net income of his entire estate. The executor now has in his hands about \$28,000 ready for distribution. What must he do with it to satisfy the provisions of the will?

Bangs, Stetson, Tracy & McVeigh, for executor.

Held, That the testator, by the ninth article of that instrument, gave a preference to his widow over all other beneficiaries to the extent of the income of \$45,000, of the whole estate if it should not be of greater value than that amount, is admitted on all hands.

I do not find any expression, implication or suggestion or intention on his part that, as regards the disposition, after the widow's death, of the fund which should have been theretofore yielding income for her benefit, any person named in the will as a beneficiary should have priority over any other.

I therefore hold that all the legacies abate *pro rata*, with the single exception of the \$1,000 legacy to the widow. Her representative is entitled to receive the same in full.

As to commissions, I understand that the accounting party has already received such sums as are grantable to him by law in his capacity as executor. As the trust

for the widow's benefit is terminated, he may properly retain full commissions as trustee upon such portion of the \$38,000 as is now released for distribution to legatees, except the \$1,000 payable to the widow's representative. He is entitled, I think, to one-half commissions for receiving such portion of said \$28,000 as, in accordance with this decision, must be retained in his hands upon the trusts that still remain unexecuted.

Opinion by *Rollins, S.*

COUNTY.

N. Y. COURT OF APPEALS.

The First Nat. Bk. of Ballston Spa, *applt.*, v. The Board of Supervisors of Saratoga County, *respt.*

Decided Oct. 4, 1887.

The treasurer of the county executed notes purporting to be issued by authority of the board of supervisors, but no such authority existed. Plaintiff discounted them and the proceeds were used to apply on the treasurer's account with the State treasurer. *Held*, That an action on said notes against the county was not maintainable. The county is not responsible for the defaults or omissions of the county treasurer in respect to the moneys due the State in any other manner than the law has declared.

The power of a county as a contracting party is limited by statute and can only be exercised by the board of supervisors or in pursuance of a resolution adopted by them.

This action was brought to recover the amount of two notes which were discounted by plaintiff under the following circumstances: The notes in suit were executed by M., the treasurer of

the county of Saratoga, in his name of office. They purported to be executed by authority of the board of supervisors of said county, but in reality no such authority had been given. The proceeds of the notes when discounted were credited by plaintiff to the individual account of M. with plaintiff, and were paid out on checks drawn by M. to the order of the State treasurer to be applied on M.'s account with that officer. The complaint asked for judgment against the county as for so much money had and received by it for its benefit and use.

L. B. Pike, for applt.

Charles S. Lester, for respt.

Held, That the action was not maintainable; that no person can make himself a creditor of another by voluntarily discharging a duty that belongs to that other; no debt can be implied in law from a voluntary payment of the debt of another, that is, a payment made without his request and by one who is under no legal liability or compulsion to make it; that the moneys due the State were payable by the treasurer of the county not as its officer or agent, but as an individual designated by his official name for the performance of specific duties, and the county is not responsible for his omissions or defaults in respect thereto, nor at all concerned with them any further or in any other manner than the law has declared.

When a county treasurer neglects to pay over or account for taxes to the comptroller as required by law, Laws of 1855, Chap. ;

Laws of 1863, Chap. 393, not until after the remedy has been exhausted against him and his bondsmen can the county be required to act.

The power of the county as a contracting party is limited by statute, 1 R. S., 364, § 1, subd. 3; id., 367, § 4, subd. 2, and those can be only exercised by the board of supervisors or in pursuance of a resolution adopted by them.

Newman v. Supervisors of Livingston County, 45 N. Y., 687; Liberty v. Supervisors of Sullivan County, 92 id., 570, distinguished.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Danforth, J.* All concur, except *Peckham, J.*, not sitting.

ASSIGNMENT FOR CREDITORS. JURISDICTION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Ernest Ludeke et al., *respts.*, v. J. Lawrence McKeever, *applt.*

Decided June 18, 1887.

Advertising for presentation of claims under an order of the Court of Common Pleas by the assignee is not a proceeding for an accounting and does not deprive the Supreme Court of jurisdiction of an action to compel an accounting.

Appeal from order denying motion for stay of plaintiff's proceedings and from order granting judgment on the pleadings.

Action by plaintiffs as judgment creditors of the assignors, in behalf

of themselves and other creditors, to compel an accounting by the assignee and payment of their claims. More than a year had elapsed since the date of the assignment. The answer set up that prior thereto the Court of Common Pleas had granted an order authorizing defendant to advertise for creditors; that such advertisement was had; that plaintiffs never presented their claim to him, and by said order the Court of Common Pleas acquired exclusive jurisdiction of the matter of the accounting. The court ordered judgment on the pleadings in favor of plaintiff.

John P. Adams, for *applt.*

Franklin Bien, for *respts.*

Held, No error. It does not appear from the answer of defendant that any proceedings for an accounting had been initiated in the Court of Common Pleas at the time of the filing of the bill for an accounting in this action. Advertising for the presentation of claims under an order of the Court of Common Pleas by the assignee is not any proceeding for the purpose of passing the assignee's accounts. Such proceeding is initiated after the time limited by the statute by the filing of the petition of the assignee or by the application of a creditor and the subsequent proceedings thereon. The answer therefore set up no defense to the relief which was asked for in this action.

Order affirmed, with costs of appeal in one case and disbursements in both..

Opinion *per curiam*.

CONVERSION. BONDS.

N. Y. COURT OF APPEALS.

The Northampton Bank, *respt.*
v. Kidder et al., *appls.*

Decided June 7, 1887.

Certain bonds which stated that on default in the interest the principal should become due were stolen from plaintiff, and purchased by defendants some years after and after default had been made and a foreclosure of the mortgage begun. In an action for conversion, *Held*, That defendants were not *bona fide* holders, having purchased paper which was overdue at the time, and it not appearing that those of whom they purchased were *bona fide* holders who had purchased before maturity.

This was an action for the conversion of two bonds by defendants. A statement of facts was agreed upon, from which it appeared that a certain railroad company issued bonds on their face, payable April 1, 1911, interest payable semi-annually upon the presentation and surrender to the company of the coupon or interest warrant for each instalment of interest as it became due. Each bond contained this clause: "In case of the non-payment of the interest for any half-year when demanded, and the same remaining unpaid for six months, and likewise in case of default for six months in the stipulated contribution to the sinking fund herein-after referred to, the principal shall, without further demand or notice, become due and payable from and after the expiration of six months from the date of such default, with interest then accrued and in arrear." The bonds in suit

were stolen from plaintiff in 1876, and were purchased by defendants in April, 1881. No interest had been paid upon them for the years 1877, 1878, and April, 1879, nor was any contribution made to the sinking fund during the period from 1876 to Dec., 1882, inclusive, "and the defaults have never been made good for any of the payments which became due from 1876 to 1882." A foreclosure of the mortgage on account of said defaults was commenced in 1876 and a receiver of the company appointed; that said foreclosure suit was pending at the time of the trial of this action. It did not appear that the persons of whom the defendants purchased the bonds in suit were *bona fide* holders who had purchased before maturity.

W. M. Safford, for *appls.*

W. G. Peckham, for *respt.*

Held, That plaintiff was entitled to recover, the bonds being overdue when defendants purchased them, and had thus ceased to be negotiable in the sense which frees the transaction from all inquiry into the rights of antecedent holders. 21 Wall, 138, 148; 113 U. S., 476, 499; 131 Mass., 147.

Also held, That the language used in the statement of facts implied that a demand of the interest had been made on the company or that the company had done that which dispensed with its necessity, and the statement that there had been a default for which a foreclosure was commenced and receivers appointed is equivalent to a statement that the company had been guilty of such violation of the

relieves the company from liability caused thereby,

Where proofs of loss are retained forty-five days before objection made, any objections thereto will be deemed to have been waived.

The action was upon a policy of fire insurance. Plaintiff took it from the insured as assignee for benefit of creditors. Defendant now objects that the acknowledgment to his assent to accept is defective.

N. Chase, for applt.

F. W. Betts and *J. M. Whitman*, for resp't.

Held, That the objection was without force. The statute, Chap. 466, Laws of 1877, is for the benefit of the creditors of the assignor. It was no part of its purpose to enable a debtor of the assignor to escape or delay payment. Plaintiff has good title against the assignor and against defendant.

The policy also provided that the company would not be liable for loss by the use of kerosene, except for lights, the lamps to be filled by daylight and without the use of artificial light. This is not a forfeiture of the policy if kerosene lamps are used and filled by night or by artificial light, but an exemption of defendant from loss thereby caused. Whether the loss was so caused was a question of fact which the jury have decided against defendant.

The answer denied that due proofs of loss were presented. Proofs were presented and forty-five days after their receipt they were returned, but defendant made certain written objections to their

sufficiency. After so much delay we think we must regard the objections as waived and the proofs as sufficient. 71 N. Y., 396.

Judgment affirmed.

Opinion by *Landon, J.*; *Learned, P.J.*, and *Bockes, J.*, concur.

NEGOTIABLE PAPER. PAYMENT.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

John B. Beaman, *resp't.*, v. Nelson Lyon, *applt.*

Decided May, 1887.

One who puts his name upon the face of a note preceded by the word "surety" is liable as maker.

Payment must be pleaded although the complaint contains a formal allegation of non-payment and the answer is, among other things, a general denial.

Possession of a note is *prima facie* evidence of delivery and is enough in the absence of evidence proving non-delivery.

Appeal from judgment for plaintiff.

The action was on a note in this form: "\$500. Poultney, Vt., April 7, 1881. One day after date for value received I promise to pay to J. B. Beaman or bearer five hundred dollars with interest annually. Ensign S. Lockrow. Surety, Nelson Lyon." The action was against Lyon alone. Plaintiff knew that Lyon was an accommodation surety. Defendant offered to show that Lockrow assigned his property to plaintiff in 1882 and that the assignment was intended, among other things, to pay this note. This evidence was held incompetent because payment

was not pleaded. The answer contained a general denial and other defenses.

W. H. King, for applt.

Isaac Lawson, for respt.

Held, That the judgment was right. Defendant was liable as maker, although the word "surety" preceded his signature. It was good pleading to set forth the note. Code, § 534.

The testimony of Lockrow was properly excluded. It was evidently intended to prove a partial payment. This had not been pleaded and it must be, even though the complaint contained a formal allegation that the note had not been paid and although the answer contained a general denial. Defendant could plead payment, although it had not been made by him. It is said that there was no proof of delivery. But possession of the note by plaintiff was *prima facie* evidence of delivery, and there was no proof to the contrary.

Judgment affirmed.

Opinion by *Learned, P.J.*; *Bockes* and *Landon, JJ.*, concur.

MURDER. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People, *respts.*, v. Oscar L. Beckwith, *applt.*

Decided July, 1887.

It seems that the provisions of the Penal Code, § 181, as amended in 1882, requiring upon a conviction of murder or manslaughter direct proof of the death of the person alleged to have been killed does not exclude evidence of points and features of resemblance between the mutilated body and the person charged to

have been killed, nor does it exclude proof of circumstances tending to establish identity.

Where the crime is committed before the Penal Code took effect it is enough to establish the identity by facts and circumstances sufficiently convincing to exclude all reasonable doubt.

Appeal from judgment and sentence upon defendant's conviction of murder in the first degree. The person murdered was charged to be one Vandercook. It was difficult to identify the remains because, as alleged, defendant burned the head and certain parts of the body on which in life there were peculiar marks.

L. F. Longley, for applt.

A. B. Gardenier, for respt.

LANDON, J.—It is objected that § 181 of the Penal Code requires "direct proof" of the death of the person alleged to have been killed and it is said that there is no such proof. The homicide was committed Jan. 10, 1882. The words "direct proof," etc., were added in 1882 to the Code of 1881, and the Penal Code did not go into effect until Dec. 1, 1882. See § 727. The common law rule, therefore, applies to this case. See Penal Code, § 2. We think that it was competent to establish the identity by presumptive proof, that is, by facts and circumstances tending to establish the identity and sufficiently convincing to exclude all reasonable doubt. 5 Cush., 295; 3 Park., 199; 2 Foster & F., 833; 3 Greenl. on Ev., § 133. We think, also, that the identity was established beyond a reasonable doubt. But even if the case should be governed by the above

§ 181 we do not think direct proof of identity should be held to exclude the points and features of resemblance and circumstances tending to establish identity. Proof of identity is a matter of opinion in such cases and is based upon the witness' impression of the resemblance between the body and his mental picture of the person alleged to have been killed. However direct his testimony, it is but an opinion. If several witnesses were to testify to points and circumstances each might furnish some point, and the evidence of all together might to a jury be far more convincing than the direct identification of one witness. So we think that when the legislature required direct proof of the death they could not have intended to require any higher proof than the nature of the case would admit of.

Conviction and judgment affirmed.

Bockes, J., concurs; *Learned, J.*, dissents.

LEGACIES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Clementina Schnorr et al. v. Hermina Schroder et al.

Decided June 18, 1887.

Where at the time of making the will testator had ample personal estate to satisfy all legacies mentioned, no intention can be inferred of making payment of the legacies a charge on the real estate, although he may afterward have invested his personality in real estate and there is a general residuary clause.

Submission on agreed case.

Testator by his will made spe-

cific bequests to one R., gave three legacies of \$1,000 each, two of them to nephews, and gave the residue of his estate to his daughter. At the time of making the will testator had over \$30,000 in personal property, but subsequently invested some of it in real estate, and at his death had not sufficient personal property to pay debts and funeral expenses. The question is whether the legacies are a charge on the real estate.

Jesse K. Furlong, for pliffs.

Richard M. Bruno, for debts.

Held, This question is a matter of intention and such intention may be gathered from the will itself and also from the circumstances surrounding the testator at the time of the making of the will. Thus it has been held that where it appears that the testator must have known at the time of making the will that he had no personal estate, and that he had real estate, and legacies are given, it will be presumed that * * * the testator did not intend to go through an idle ceremony in making the bequests, but that he intended them to be paid, and that as he knew that they could only be paid out of his real estate he must have intended them to be a charge on his real estate. 100 N. Y., 511

But where at the time of making the will the testator has ample personal estate to satisfy all the legacies mentioned in the will. No intention can be inferred of making the payment of legacies a charge upon his real estate, unless the terms of the will itself require

this interpretation. The mere existence of a general residuary clause is not sufficient to raise the presumption of an intent to charge real estate with the payment of legacies. There must be something more or the intention will not be rendered sufficiently apparent to make the the legacies a charge upon the real estate thus devised.

Hoyt v. Hoyt, 85 N. Y., 142, and *Scott v. Stebbins*, 91 id., 605, distinguished.

In the case at bar there being no indication of any intention of the testator to charge his real estate with the payment of legacies, and the rule in England that if legacies are given generally and the residue of the real and personal estate is afterward given in one mass the legacies are a charge on the residuary real as well as personal estate not being recognized by the courts of this State, the legacies in question did not become a charge on the real estate of the testator.

Judgment accordingly.

Opinion by *Van Brunt*, P.J.; *Daniels* and *Bartlett*, JJ., concur.

BOUNTIES. SUPERVISORS.

N. Y. COURT OF APPEALS.

Parker et al., admrs., respts., v. The Board of Suprs. of Saratoga Co., applt.

Decided Oct. 4, 1887.

The power conferred on boards of supervisors to borrow money on the credit of the county to pay bounties was not exhausted when once exercised, but the boards had power to borrow and renew

their obligations from time to time to continue the indebtedness so created. In an action on a note given by the treasurer under authority of the board for such purpose the burden is on the county to show that the note in question was outside of and in excess of the actual authority of the treasurer.

Authority to the treasurer to borrow money to extend a debt already existing, such as bonds and notes of the county, is not a delegation of the judicial powers of the board.

This was an action upon certain notes issued by M., the treasurer of Saratoga County, to P., plaintiff's intestate. In Nov., 1865, the county of Saratoga owed about \$918,000 for money borrowed on its credit to pay bounties, etc. The debt was represented by notes of the county, signed by M., as county treasurer, and by unsealed instruments in the form of bonds, executed in behalf of the county by the chairman of the board of supervisors and by M., as treasurer. These obligations were incurred under two resolutions of the board of supervisors, one of which, passed in Dec., 1864, provided for the payment of a county bounty to volunteers who should thereafter enlist, and be credited upon any town of the county upon its quota, and the other passed Dec., 1863, which authorized the borrowing of money on the credit of the county for the payment of bounties to volunteers, to be disbursed upon the orders of the supervisors of the respective towns, and which also provided in substance that the amount drawn by the supervisors of the towns respectively should constitute a town debt of the town drawing the

same, payable by taxation upon its property. At the annual meeting of the board of supervisors in Nov., 1865, a resolution was passed which provided that a portion of the unpaid bounty debt should be raised by taxation, and that the county treasurer should procure an extension of the time of payment of the balance. This debt was represented by a large number of obligations, many of which matured in Feb., 1866. A similar policy was pursued at each annual meeting of the board until 1875.

Charles S. Lester, and A. Pond, for applt.

Lemuel B. Pike, for respts.

Held, That the power conferred upon boards of supervisors by Chaps. 8 and 72, Laws of 1864, and Chap. 41, Laws of 1865, to borrow money on the credit of the county to pay bounties to volunteers and for other purposes mentioned in those statutes, and to execute obligations for its payment was not exhausted when once exercised, but the boards of supervisors had power to borrow money and renew their obligations from time to time for the purpose of continuing indebtednesses created under said act; that in construing the authority conferred upon the county treasurer by the resolutions the court may consider the attendant circumstances, the situation of the parties and the object in view.

An authority given to a county by the legislature to extend its indebtedness would fairly include the power to do it by borrowing money and substituting new obligations in place of the old ones.

In each year from 1865 to 1875 the treasurer's accounts were audited by a committee of the board. He presented as vouchers each year notes which on their face referred to the resolution of the year preceding that in which they were given, as his authority for issuing them. These vouchers were accepted without objection and allowed as credits.

Held, That it must be inferred that the board was cognizant of the construction put by the treasurer upon his authority, and its acquiescence during so long a period in his assumption of the power to borrow money and give new obligations as a means of evidence that the authority intended to be conveyed included these transactions.

It was claimed that there was no town bounty debt and therefore no subject for the exercise of the authority conferred on the treasurer. By § 22 of the Act of Feb. 29, 1864, the board was authorized to borrow money on the credit of the town, only upon the vote of a majority of its electors. There was no vote of the towns authorizing the debt, and the money borrowed by which it was created, was in fact borrowed on the credit of the county, and the town bounty debt mentioned in the resolution was legally a debt of the county and not of the several towns. 34 N. Y., 516.

Held, That although the debt was treated as a town debt, the authority vested in the treasurer related to this debt, whatever may have been its legal character, and

in construing the authority, it is wholly immaterial that the debt was not described with legal accuracy in the resolutions authorizing it.

It appeared that the treasurer had fraudulently overissued these notes and that at the annual meeting of the board in 1874 there were outstanding \$138,638 of these notes, and that if the money which had been raised by taxation had been applied to its proper purpose, there would have been outstanding but \$20,801 of these notes. It was not shown that the treasurer had misapplied any of the moneys for which the notes in suit were given, and they did not at any time exceed in amount the sum the treasurer was authorized to raise. There was no proof that the payee of the notes did not act in good faith.

Held, That the treasurer had authority to deal with the payee in the manner he did, and that the burden was upon defendant to show that the notes in question were outside of and in excess of the actual authority of the treasurer.

When the act of an agent apparently conforms to the authority conferred upon him, and includes the particular transaction, and is not in excess of the authority conferred, so far as third persons dealing with the agent can know, the act of the agent is presumptively within the authority conferred, and the burden of proving that it was done after the authority was spent rests upon the principal, and is not met nor the

presumption overthrown by proof that in the course of the agents dealings, he fraudulently exceeded his authority, without showing or giving evidence from which a jury would have a right to infer that the particular transaction was unauthorized. It makes no difference whether the agency is a general one or confined to a particular series of transactions. 14 Wend., 138.

It was shown that in some years renewal notes were issued to plaintiff's intestate after the treasurer had received notes held by other parties exceeding in amount the debt which the supervisors had requested him to extend.

Held, That there was as much reason regarding those notes as representing unauthorized loans as there is for regarding the notes surrendered by plaintiff's intestate on receiving new notes as of that character. 13 N. Y., 619.

The resolutions of the supervisors were assailed on the ground that they assumed to delegate to the treasurer the judicial and legislative power of the board to ascertain and determine the extent and amount of the liabilities of the county, and to audit and allow the same.

Held, Untenable; that the authority was to procure an extension of a debt already existing having a perfectly defined character, and not to create a new debt or to pass upon or allow a disputed or doubtful claim.

The bonds and notes of a county, issued for loans authorized by law are not open accounts for county

charges which must be presented to the board of supervisors for audit.

As to whether the county could be charged in case it had been affirmatively shown that the notes in question were fraudulently issued by the treasurer in excess of his authority, *quaere*.

Judgment of General Term, affirming judgment for plaintiff, modified as to rate of interest after 1880, and as modified affirmed.

Opinion by *Andrews, J.* All concur, except *Peckham, J.*, not sitting.

CONTRACT.

N. Y. COURT OF APPEALS.

The Diamond Match Co., *respt.*,
v. Roeber, *applt.*

Decided Oct. 4, 1887.

A contract not to engage for ninety-nine years in a certain business in any of the States or territories of the United States except two named, made on a sale of said business, being partial and in general restraint of trade, is valid.

The doctrine as to what is the general restraint of trade does not depend on State lines.

The fact that the covenant is practically unlimited as to time is not an objection, the contract being otherwise good.

The jurisdiction of the court to enforce the covenant by injunction is not affected by the fact that a bond for its performance was given with a stipulation for liquidated damages.

An action for such enforcement may be maintained by a foreign corporation.
Affirming S. C., 21 W. Dig., 853.

This action was brought to restrain defendant from manufacturing and selling friction matches. It appeared that in Aug., 1880, defendant, who was engaged in the city of New York in manufac-

turing friction matches, sold his manufactory, the stock and materials on hand together with the trade, trademarks and good will of the business to a Connecticut corporation engaged in the business. Both the vendor and the vendee disposed of their goods all over the country. The bill of sale executed by defendant contained a covenant that he would not, "at any time or times, within ninety-nine years, directly or indirectly engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employee of the said Swift, Courtney & Beecher Co.) within any of the several States of the United States of America or in the territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture friction matches in the State of Nevada and the Territory of Montana. Contemporaneous with the execution of this covenant defendant executed to the vendor a bond in the penalty of \$15,000, conditioned to pay that sum as liquidated damages in case of a breach of his covenant.

Robert Sewell, for *applt.*

Noah Davis, Jr., for *respt.*

Held, That the covenant being partial and not in general restraint of trade was valid. 7 Cow., 306; 21 Wend., 157; 10 N. Y., 241; L. R. 14 Ch. Div., 351; 7 Bing., 735.

When the restraint is general, but at the same time co-extensive only with the interest to be protected, and with the benefit intended to be conferred, there seems

to be no good reason why, as between the parties the contract is not as reasonable as when the interest is partial, and there is a corresponding partial restraint.

The motive of the covenantee is not the test of the liberty of such contract. A party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. 3 Beav., 383; 7 H. & N., 189; L. R. 9 Eq. C., 345; L. R. 4 App. C., 674; 20 Wall., 64; 103 Mass., 63; L. R. 14 Ch. Div., 351.

Also held, That the covenant is practically unlimited as to time, is not an objection, the contract being otherwise good. 5 M. & W., 548; 7 C. B. N. S., 317.

Also held, That the doctrine as to what is the general restraint of trade does not depend upon State lines. The boundaries of States are not those of trade and commerce.

Also held, That the equitable jurisdiction of the court to enforce the covenant by injunction was not excluded by the fact that the defendant in connection with the covenant executed a bond for its performance with a stipulation for liquidated damages. 87 N. Y., 405; 33 Beav., 585; 10 Jur., N. S., 1123; 5 De Gex., McN. & G., 1, Kay, 663; 27 Mich., 23.

Also held, That as the obligation ran to the vendor, its successors and assigns, "and the covenant being in the nature of a property

right, it was assignable, at least in connection with the sale of the property and business of the assignee. 41 Ia., 137.

Also held, That the fact that plaintiff is a foreign corporation is no objection to its maintaining this action. 34 N. Y., 208; 84 id., 367; Code Civ. Pro., § 1779.

Also held, That defendant, having the benefit of the contract, must abide by its terms, and is not in position to raise the question that his contract was *ultra vires* the powers of that corporation. 68 N. Y., 62.

Judgment of General Term, which modified as to costs and affirmed as modified judgment for plaintiff, affirmed.

Opinion by *Andrews, J.* All concur, except *Peckham, J.*, dissenting.

MUNICIPAL CORPORATIONS. NEGLIGENCE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL
TERM. THIRD DEPT.

Mary Sawyer, *respt.*, v. The
City of Amsterdam, *applt.*

Decided July, 1887.

Where the complaint alleged that plaintiff was injured by a break in a sidewalk and she subsequently presented a written claim to the common council alleging the same cause of injury, and no mention was made in either paper of snow or ice, *Held*, That snow and ice might still be shown as a cause contributing to the injury and was proper to show the circumstances thereof; and this whether defendant was legally negligent or not in allowing the snow and ice to be present.

Appeal from judgment for plaintiff.

The complaint alleged that

plaintiff was injured because of an abrupt break of ten or fifteen inches in a sidewalk. This was while Amsterdam was a village. On April 16, 1885, a charter was granted it, and pursuant to its 31st section plaintiff presented to its common council a claim in writing specifying the circumstances and extent of the injury. There was no statement in it or in the complaint that snow or ice existed. On the trial, under objection, plaintiff proved the existence of snow and ice at the time of the injury. The referee found that the injury was caused by the break, but also that snow and ice had been continuously at the spot for some time. He did not expressly find that the village was negligent in allowing the snow and ice to remain there, but he refused to find that it was not negligent.

E. P. White, for applt.

W. B. Dunlap, for respt.

Held, That the evidence was competent. It was proper to show the condition of the sidewalk and the circumstances attending plaintiff's fall, and hence the presence of the snow and ice and how they contributed to it. We think the claim that plaintiff has recovered for a different cause of action from that presented cannot be supported. If the ice was not negligence, then the break was the sole negligence; if the ice constituted negligence, then we have two concurring acts of negligence and the city was responsible for at least one of them and is therefore liable. In the cases cited by appellant—77 N. Y., 83, and 101 id., 661—it did

not appear which of two causes injured plaintiff, and the defendant was chargeable with only one of them. Here defendant was chargeable with negligence in respect to one cause which did injure plaintiff, however it may be with the other.

Judgment affirmed, with costs.

Opinion by *Landon, J.*; *Learned, P. J.*, and *Bockes, J.*, concur.

EVIDENCE. LUNATICS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Francis M. Dominick, *applt.*, v. William M. Dominick et al., *respts.*, and Mary E. Dominick, *applt.*

Decided June 18, 1887.

An inquisition in lunacy is only evidence as to the condition of the alleged lunatic at the time the inquisition was taken.

But the submission to a jury of such an inquisition which stated that the person named had been a lunatic for two years prior thereto, without other remarks than that it was not conclusive, is not a ground for setting aside a verdict in the absence of objection or exception to the manner of submission or requests for further instructions.

Evidence admissible on the question of soundness of mind of a testatrix.

Appeal from order denying motion for new trial.

Action for partition of real estate. Plaintiff claimed as heir-at-law of E. D., the former owner. Defense, that by a will made in 1880 E. D. devised the premises to other persons and excluded plaintiff from all right and interest therein. He claims that in 1883 the testatrix destroyed the will intending to revoke it; while de-

pendants claim that it was destroyed by defendant Mary without testatrix' knowledge, and that testatrix was of unsound mind at the time and incapable of revoking it.

The jury found that the will was destroyed by testatrix, and that she was of unsound mind for two years prior to Jan. 31, 1885.

It is claimed that the court erred in permitting an inquisition to be read in evidence, taken in 1885, by which it was found that testatrix had been a lunatic and of unsound mind for two years preceding that time.

D. C. Briggs, for appls.

W. F. Dunning, for respts.

Held, That under § 2335 of the Code the jury are not permitted to return an inquisition retroactive in this respect. 27 Hun, 480. "The investigation must be confined to the question whether he is so incompetent at the time of the inquiry." To permit an intelligent determination of this question evidence is allowed to be given of the demeanor or state of mind of the person for not more than two years prior to the hearing, unless the court in which the proceeding is instituted shall otherwise direct, but no authority has been conferred enlarging the extent of the determination under the commission. And that would restrict it as evidence to the time when the inquisition itself shall be taken. But this rule was not transgressed in the submission of this case to the jury. For the inquisition was submitted to them without any remarks as to its

effect further than that it was not conclusive. Whether it should be given a retroactive effect by the jury was not within the direction of the court. If anything more particular than what was said had been deemed necessary, further instructions concerning the effect of the inquisition should have been asked. But it was not. Neither was any objection or exception taken to the manner in which the inquisition was submitted as evidence to the jury. Accordingly, there was no ground for setting aside the verdict because any undue effect was allowed to be attributed to the inquisition as proved.

A paper written by testatrix to plaintiff was offered in evidence and excluded. It stated "I want you to come over, as Mr. G. has made my will and I won't have it; he made it to suit himself" and not as I wanted it; he put brother James' children in it; I will tear it into slivers when I get it; you and William are my only heirs. Come over to-day and I will deed you my house; James' children shan't have one penny."

Held, That the exclusion of this testimony was error. If she in fact wrote and subscribed this paper, as its statements were intelligent and well connected, they would have some bearing on the disposition to be made by the jury of the inquiry presented to them. It certainly would have some tendency, if the jury believed it to have been authentic, in the way of proof to establish the conclusion that testatrix was

not of unsound mind at the time when this paper was received, which was near the time of the destruction of the will. It is not necessary to determine that it would have been controlling in its effect. If testatrix was of sound mind at the time, the destruction of the will was a revocation of it, and that would entitle plaintiff to maintain this action for partition of her estate. While if she was, as the jury found the fact to be, a lunatic from the early part of 1883, then this destruction of the will by her was not a revocation and it remained in force as her will and excluded him from all right and interest in the property. This was a vital subject of controversy on the trial. The evidence excluded was of the same nature as that previously taken as indicative of the mental condition of testatrix. It had a bearing in the same direction and should have been received.

Verdict set aside and new trial ordered on last ground.

Opinion by *Daniels, J.; Brady, J.*, concurs.

N. Y. CITY. BUILDING LAW.

N. Y. COURT OF APPEALS.

The Fire Dept. of the City of New York, *respt.*, v. The Atlas SS. Co., (Limited), *applt.*

Decided Oct. 4, 1887.

A provision in a lease from the city authorizing a structure to be erected differently from that required by law is no defense to an action to restrain the erection of

such building until the requirements of the law are fulfilled and for a penalty for a violation of the law.

Section 8, Chap. 547, Laws of 1874, constituting the board of examiners is not unconstitutional.

The determination of such board cannot be reviewed by the courts even if its requirements are unreasonable, so long as they are not wholly impracticable.

The defendant leased from the city of New York a pier. The lease authorized it to erect thereon a structure in a manner different from the requirements of the law in relation to such structures. Defendant filed in the proper office plans and specifications for its building and applied for a permit to erect the same. The application was granted upon certain conditions. These conditions were not complied with, and this action was brought to recover the penalty imposed by § 32 of Chap. 625 Laws of 1871, and also to restrain defendant from further occupying and using its building until the requirements of the permit for its erection have been complied with. A judgment was rendered in favor of plaintiff.

Everett P. Wheeler, for *applt.*

W. M. L. Findlay, for *respt.*

Held, No error; that the provision in defendant's lease, allowing a structure different from that required by law, was no defense to this action. The fire department of the city of N. Y. has jurisdiction over the construction of all structures on the wharves and piers in said city, whether owned by the city, or by private individuals, and the jurisdiction given by § 99 of Chap. 574, Laws

of 1871, to the dock department over the wharves and piers belonging to the city, and the structures thereon, is not an interference of the building and fire laws of the city. As no department officers of the city government could enter into a stipulation with the defendant by which it would be authorized to violate any law enacted for the public safety, whether the plaintiff acts independently as a distinct entity with corporate powers, or as an agency of the city representing it; it is not estopped from claiming against defendant obedience to the building laws and all orders and regulations lawfully made in pursuance thereof.

Section 8, Chap. 547, Laws 1874 which constitutes the board of examiners, to whom applications for building permits must be made, was claimed to be invalid as in conflict with § 2 of Art. 10 of the Constitution which provides that all city officers whose election or appointment is not provided for by the Constitution, shall be elected by the electors of the city or appointed by the city authorities designated by the legislature to make such appointment. This office was created subsequent to the adoption of the Constitution. The members of the board receive no salary, take no oath of office and have no tenure or term of office.

Held, That the claim is untenable 15 N. Y., 522; 52 id., 83.

Also held; That the determination of the board of examiners could not be reviewed by the courts, even if their requirements

were unreasonable, so long as they were not wholly impracticable.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by *Earl, J.* All concur, except *Rapallo, J.*, absent, and *Peckham, J.*, dissenting on the ground that the subject was under the exclusive jurisdiction of the dock department.

CORPORATIONS. RECEIVER.

N. Y. COURT OF APPEALS.

The People v. The Knickerbocker Ins. Co. *In re* claim of Pendleton et al.

Decided Oct. 4, 1887.

Prior to its dissolution the corporation obtained a writ of error to review a judgment recovered against it in Tennessee, gave a bond and assigned certain property in this State to secure the sureties. On learning this the receiver in the action to dissolve intervened in the hearing of the writ of error in the U. S. Supreme Court and procured a reversal. He was not made a party, however. *Held*, That the funds in his hands were not liable for a judgment subsequently rendered by default in Tennessee in said case; that he did not make himself liable for the final result of the litigation.

In Dec., 1882, the Knickerbocker Life Insurance Company was dissolved by the Supreme Court of this State, and D., the appellant, appointed receiver. Prior to that time a judgment had been rendered against it by the U. S. Circuit Court for the Western District of Tennessee, in favor of the respondents upon a policy issued by it. The company obtained a

writ of error for its review, and in that proceeding gave a bond with sureties. The receiver having ascertained that the company had given these sureties—a mortgage upon certain portions of its property in New York, and assigned to them a mortgage to indemnify them against liability—reported these facts to the court, and under its direction employed counsel to argue the cause upon hearing of the writ of error. The judgment was afterward reversed, and a new trial ordered. Before the mandate was sent down it was discovered that the citation had been irregularly issued, having been addressed to only one of the four plaintiffs below. The court of its own motion ordered the parties to the writ of error to show cause why the decision should not for that reason be vacated and set aside, and the writ dismissed. The receiver thereupon by petition, stating to the court his ignorance until that time of the proceedings in question, asked that by amendment the irregularity might be cured, so that the decision should stand and the mandate of the court issue, stating as a reason that “upon taking charge of the property of the company” he found it encumbered by said mortgages and assignments, “and that all of said property remained encumbered thereby, waiting the issue of the mandate of the court.” The request was granted, and after reargument the mandate was issued. The receiver was never made a party to the record in either court,

and never in any way took part in the conduct of the defense or controlled or directed it. Subsequently in Jan., 1886, the plaintiffs in the action took judgment by default against the company, and presented that judgment as the sole basis of a right to share the funds in the hands of the receiver. The court sent this claim to a referee, who reported that the judgment was without jurisdiction so far as the assets under the control of the court were concerned; that the claim was not a valid charge, or entitled to a distributive share of them. The referee’s report was confirmed by the Special Term, but reversed at General Term.

Leslie W. Russell, for applts.

A. Walker Otis, for respts.

Held, Error; that the receiver not having been made a party to the action the funds in his hands should not be affected by it, as he has not by interference or otherwise made himself responsible for the final result of the litigation, 58 N. Y., 563, his sole object and reason for intervening on the hearing of the writ of error being to protect the property in his hands from an incumbrance which had no connection with the subject matter of litigation in the original suit, but which grew out of a distinct and collateral act of the company after judgment in that suit and in aid of its endeavor to avoid it. The court in Tennessee had nothing to do with those proceedings, and the receiver committed no act within its jurisdiction, nor was the property which

he sought to release ever under its control.

Castle v. Noyes, 14 N. Y., 329; Jay v. De Groot, 2 Hun, 205, distinguished.

Order of General Term, reversing order of Special Term, reversed, and order of Special Term affirmed.

Opinion by *Danforth, J.* All concur

NEGLIGENCE. EVIDENCE.

N. Y. COURT OF APPEALS.

Archer, *respt.*, v. The N. Y., N. H. & H. RR. Co., *applt.*

Decided Oct. 4, 1887.

A passenger on a railroad who has been brought into a depot by one of its owners is entitled to a safe passage out of it and has a right to act on the assumption that every necessary precaution has been taken to make it safe, and a right to regard the platform as a safe and proper place to stand.

It is negligence for a railroad company to bring without notice a train at a rapid rate of speed up to a station among incoming and outgoing passengers, especially when its cars are so constructed as to sweep a portion of the platform provided for passengers.

A photograph of the place of accident, if a fair representation of the premises, is admissible as an aid to the investigation as much as a map or other diagram.

This action was brought to recover damages received by plaintiff through the alleged negligence of defendant. It appeared that defendant and the N. Y. & N. E. RR. Co. had built and were using together a depot at Hartford, Conn., which had exits on the east and west sides. Plaintiff, a passenger on the N. Y. & N. E. RR., and who had never been in Hartford before, on alighting from

the train followed a number of other passengers out of the depot onto a platform which extended along its east side. One of defendant's tracks ran along the outer edge of this platform and so close to it that a car moving on this track would overlap the platform two or three inches and more according to their oscillations. On alighting from the train no one had told plaintiff where to go. It was a dark, hazy evening. When plaintiff came out on the platform a cabman approached and was engaged. He took one of plaintiff's bags, which was standing on the outer edge of the platform, and carried it toward his cab, which was standing a few feet away, leaving plaintiff standing on the platform facing the east. As the cabman opened the door of his cab one of defendant's trains passed between him and the platform at an unusually rapid rate. Plaintiff was struck by this train and received the injuries complained of. It appeared that plaintiff did not know of the existence of the track on which the train was moving, and did not see the train before being struck. It also appeared that the cabman did not see the train before it passed and did not know of its approach; neither he nor plaintiff heard a bell or whistle sounded. The case was submitted to the jury, and a verdict was rendered for plaintiff.

Henry H. Anderson, for *applt.*

Denis McMahon, for *respt.*

Held, No error; that plaintiff having been brought into the depot by one of its owners was enti-

tled to a safe passage out of it, so that he could continue his journey to his place of destination, and he had a right to act upon the assumption that every necessary and reasonable precaution would be taken by its proprietors to make it safe. He had a right to regard the platform as a safe and proper place. 50 N. Y., 60. It was negligence on the part of defendant to bring without notice a train at such a rate of speed up to a station among incoming and outgoing passengers, especially when the cars brought up were so constructed as to sweep a portion of the platform provided for passengers.

The injuries complained of were inflicted by a corporation organized under the laws of Connecticut. Upon the trial plaintiff was permitted, against defendant's exception, to read in evidence portions of the statutes of that State which relate to the running of railroad trains, stating that he offered them as bearing upon the issue as to defendant's negligence. The court refused to charge that the jury were not to be influenced by the statutes.

Held, No error.

Plaintiff offered in evidence a photograph representing, as he claimed, the *locus in quo* of the accident. He testified, on being cross-examined by defendant's counsel, that he did not make the photograph and did not know from what point it was taken. The photograph was objected to generally and the objection overruled.

Held, No error; that if the pho-

tograph was a fair representation of the premises it was admissible as an aid to the investigation, as much so as a map or other diagram, and served in like manner to explain or illustrate, and apply testimony. 103 N. Y., 501.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Danforth, J.* All concur, except *Earl, J.*, not voting.

COMMON CARRIERS.

N. Y. COURT OF APPEALS.

Furman, applt., v. The Union Pacific RR. Co., respt.

Decided Oct. 4, 1887.

It is the duty of a carrier to ascertain whether a bill of lading was delivered to the shipper, and if so he should retain the property until demanded by one claiming under that title.

Plaintiff shipped goods marked "Y. Order notify Z. Bros.," and took bill of lading for same. Defendant received the goods and forwarded them in course of transit without notice of the contents of the bill of lading except a transfer sheet stating the consignee to be "Y. Order Hup, Z. Bros." Defendant delivered the goods on order of Z. Bros. without production of the bill of lading. *Held*, That it was liable for conversion; that the word "notify" was a plain notice that Z. Bros. were not the consignees, and as no one was named in the bill of lading no delivery should have been made to any one who did not produce it.

Reversing S. C., 21 W. Dig., 204.

This action was brought to recover for the conversion of 100 bags of peanuts. It appeared that on Feb. 25, 1880, the peanuts in question were shipped by plaintiff's assignors at Norfolk delivered to the

Baltimore Steam Packet Company for shipment to Denver. That a bill of lading was given to the shippers, which, after reciting the receipt of the peanuts and their weight and the freight, was in these words: "Marked Y. Order notify Zucca Bros. to be transported to Denver, Col., he or they paying freight for the same," etc. The peanuts were in the course of transportation delivered to defendant. No bill of lading or copy thereof, or notice that one had been issued, was received with them. The preceding carrier did, however, deliver to defendant with the peanuts a transfer sheet, which contained this entry: "Consignee 'Y,' order Hup, Zucca Bros." A way-bill was made by defendant's agents at the forwarding station and sent to the receiving station, which contained the same entry. Under a column therein headed "Consignee and Destination" only the destination was given. No other writing or bill of lading or notification as to the ownership or disposition of the goods was received by defendant. It delivered them to Zucca Bros. upon their order, without the production or surrender of the bill of lading for the same. The peanuts were subsequently demanded by shippers. Defendant prior to the delivery to Zucca Bros. had no actual notice of the delivery of the receipt to the shippers or of its contents and had no actual notice or knowledge of any right or interest or ownership in the goods or of their intended disposition than as notified by the transfer sheet received from

the preceding carrier. It appeared that after the peanuts were shipped the shippers drew a draft on Zucca Bros. for the amount, which they attached to the bill of lading which they had indorsed, and that upon the draft being forwarded for collection payment was refused and the draft and the bill of lading were returned to the shippers. Plaintiff demanded the goods of defendant and the demand was refused.

Robert L. Harrison, for applt.

George H. Adams, for respt.

Held, That defendant was liable for conversion; that the word "notify" as used in the bill of lading was a plain notice, in the absence of further directions; that Zucca Bros. were not the consignees, and as no one was named in the bill of lading no delivery should have been made to any one who did not produce it; that it was defendant's duty to make inquiries before making the delivery, and it was not protected by the papers received from its immediate predecessor.

The law will allow no excuse for a wrong delivery by a common carrier except the fault of the shipper, and when there is any doubt and it can be determined by documentary evidence its production should be required. *Hutchinson on Carriers*, § 130; *Angell on Carriers* (5th ed.), § 324.

It is the duty of a carrier to ascertain whether a bill of lading was delivered to the shipper, and if so he should retain the property until demanded by one claiming under that title. 44 N. Y., 136;

9 M. G. & S., 296; 4 E. & B., 219; 53 N. H., 503.

Order of General Term, reversing judgment for plaintiff, reversed, and judgment affirmed.

Opinion by *Peckham, J.* All concur, except *Danforth, J.*, not sitting.

TRADEMARK.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Henry Schmid, *applt.*, v. Chas. Maeurer, *respt.*

Decided June 18, 1887.

An action to restrain the infringement of a trademark may be maintained by one who owns or controls the goods protected by such trademark; it is not necessary that he be the manufacturer of them. Evidence sufficient to show an infringement.

Appeal from judgment dismissing complaint on the merits.

Action to restrain the alleged infringement of a trademark. Both parties are engaged in the sale of a liquid medical preparation first made early in the present century by one S., at Salsunger, and still manufactured in that town by a corporation from which plaintiff has acquired the exclusive right to sell the compound as prepared by it in this country. Defendant learned the composition of this medicine when at work from the apothecary who then made it at Salsunger thirty years ago. Defendant has stamped the name of the Salsunger Company in an abbreviated form on the capsules of his bottles with a symbol and motto corresponding

to those on plaintiff's bottles, and his cautionary notices within the wrappers are similar to those of plaintiff.

Antonio Knauth, for *applt.*

Sidney H Stuart, for *respt.*

Held, That there is no reason apparent why defendant may not lawfully manufacture this medicine and offer it for sale, so long as he does not endeavor to deceive purchasers as to its origin by simulating the distinguishing marks adopted by plaintiff for the medicine made by the German corporation.

While I agree with the learned judge that the words "*allgemeine flusstinctor*" as applied to this compound do not constitute a trademark, I think the name of the Salsunger Company does. Its use serves to indicate that the article is manufactured at a particular establishment, a fact which may well be influential with buyers. 100 U. S., 617. The resemblance between the bottles of defendant and plaintiff is such as readily to mislead, and entitles plaintiff to the intervention of the court, although he is not himself the manufacturer of the goods he desires to protect. It is sufficient if he owns or controls them. 96 U. S., 245. Defendant's cautionary notices within the wrappers around the bottles seem equally designed for deceptive purposes.

Defendant is at liberty to represent that the medicine he makes and sells is the same in character and composition as that formerly prepared by Dr. S. in Germany, if such be the fact. He should not,

however, be permitted to use devices which tend to create the false impression that his compound is manufactured by or for the foreign corporation which makes plaintiff's medicine. Notwithstanding defendant's claim upon the trial that he had given up the employment of these devices an injunction in respect thereto might properly have been awarded. 13 Blatch., 234.

Judgment reversed and new trial granted, costs to abide event.

Opinion by *Bartlett, J.*; *Van Brunt, P.J.*, and *Lawrence, J.*, concur.

SALE. CONTRACT.

N. Y. COURT OF APPEALS.

Pope et al., *respts.*, v. The Terre Haute Car & Mfg. Co., *applt.*

Decided Oct. 4, 1887.

A contract of sale which specifies no time for delivery is in legal effect an engagement to deliver within a reasonable time; and a complaint in an action on such contract by the seller which fails to allege a tender within a reasonable time is defective.

Such defect is not waived because the objection is not taken by demurrer or answer.

This action was brought to recover the purchase price of 300 tons of iron. The complaint alleged that plaintiff duly ordered the shipment; that the iron arrived and that plaintiffs notified defendant and tendered delivery and demanded payment, but contained no averment when it arrived or was tendered, or when by the contract it was to be delivered, or that delivery was tendered within a

reasonable time. No time for the delivery of the iron is mentioned in the written contract. On the opening of the case defendant's counsel moved to dismiss the complaint on the ground (1), that it did not allege when the contract was to be performed; and (2), that it did not allege performance, or offer or tender of performance, within the time. The motion was denied.

Stephen O. Lockwood, for *applt.*

William W. Niles, for *respts.*

Held, Error; that the time for performance not having been mentioned in the contract, it was in legal effect an engagement on the part of plaintiffs to deliver within a reasonable time. *Benj. on Sales*, 683, note; 2 *Pars. on Con.*, 535; that plaintiffs' promise to sell and deliver the iron, and defendant's promise to receive and pay for it, were mutual and concurrent, and neither party can maintain an action against the other for a breach of the contract without proving performance on his part. 9 *Wend.*, 135.

Also held, That the defect in the complaint was not waived because the objection was not taken by demurrer or answer. *Code*, § 499.

Also held, That the plaintiffs not having applied for an amendment, but having taken the risk of the sufficiency of the complaint, cannot on this appeal be relieved. 76 *N. Y.*, 397; *id.*, 420.

Judgment of General Term, affirming judgment for plaintiffs, reversed, and new trial ordered.

Opinion by *Andrews, J.* All concur.

MASTER AND SERVANT. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL
TERM. FIRST DEPT.

Edward Hansen, *respt.*, v. The
Trustees of the N. Y. & Brooklyn
Bridge, *appls.*

Decided June 18, 1887.

The foreman of a gang of workmen is a fellow-servant with them so far as injuries caused by his carelessness are concerned, and the master is not liable for such injuries unless the foreman was incompetent for the place and the master did not use due care in selecting him for this employment.

Evidence insufficient to show incompetency.

Appeal from judgment in favor of plaintiff.

Plaintiff was injured while at work on the bridge while in the employ of defendants. He was one of a gang of men of which one H. was the foreman, and it was charged that the injury was due to the incompetency and carelessness of H.

The only evidence claimed to show incompetency was that of a fellow-servant who stated that he knew H. and what work he performed while there and his capacity for doing work, and in answer to a question as to his efficiency and carefulness as a foreman stated, "I don't believe he was competent to be a foreman, because there was a little man in his gang that used to take charge of his work." A motion to dismiss the case was denied and the case submitted to the jury which rendered a verdict for plaintiff.

John L. Hill, for *respt.*

W. N. Dykman, for *appls.*

Held, Error. The cases of *Crispin v. Babbitt*, 81 N. Y., 516, and *Newbauer v. RR.*, 101 id., 607, seem to hold that H., although foreman of the gang in which plaintiff was working, is to be regarded as a fellow-workman, and that plaintiff's injuries were due to the carelessness of a fellow-servant, and that defendants are not liable in this action unless H. was incompetent for the position he held and defendants had not used due care in selecting him for this employment. The mere fact that an accident has happened or that a man has been careless upon one occasion does not of itself show incompetency; some other or additional proof is necessary.

The witness did not base his judgment on what he had seen H. do, or the character of H.'s work, but simply on what somebody else did. He had been associated with H. for nine months at least, and pretended to know his capacity for doing work and yet founded his opinion on a fact which in no way bore on the competency of H. H. had been a sailor all his life, had been second mate, and had been employed on the bridge for some time, and he cannot be assumed to be incompetent without some evidence on this point. The mere fact that he had only been a short time employed as foreman raised no presumption of incompetency. He had to begin at some time to be foreman, and in view of his early life he might well have been entirely competent to act as rigger without any expe-

rience on the bridge at all. There does not seem, therefore, to have been any evidence to go to the jury that H. was incompetent, or that defendants were negligent in employing him, and the motion for a dismissal of the complaint should have been granted.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by *Van Brunt, P.J.*; *Macomber, J.*, concurs; *Bartlett, J.*, writes for dismissal of appeal on the ground that defendants being sued as a corporation and the Court of Appeals having decided that they are not a corporation, 96 N. Y., 427, the judgment cannot be enforced against them, notwithstanding the admission of incorporation in the answer.

PARTNERSHIP.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Saint Nicholas Nat. Bank, *respt.*, v. Percy R. King, *impl'd.*, *applt.*

Decided June 18, 1887.

Although as between themselves the members of a firm may restrict the rights of one partner to a particular branch of the business, yet where such partner assumes all the duties and rights of a partner in all the business of the firm he is liable as such to persons dealing with the firm, and his liability is not restricted by such arrangement.

Appeal from judgment in favor of plaintiff entered on verdict, from order denying motion for new trial and from order vacating judgment against two defendants entered previous to trial.

Action on a promissory note made by one R. and indorsed by the firm of R. & Co., it being alleged that King was a member of that firm. The answer of King denied that he was a partner.

Plaintiff proved the signature and indorsement of the note, and that Jan. 1, 1878, King was admitted as a partner in the firm, his interest being limited to such business as he might directly or indirectly bring to the firm. He was to contribute capital to carry on the business he might bring and receive a certain proportion of the net profits from said business. It appeared that his capital went into the general bank account; that he signed letters, checks and receipts as a member of the firm indiscriminately whether relating to business influenced by him or not, and assumed all the duties and rights of a partner in that firm. Whatever distinction was made as to the different interests of the firm was made in the method of keeping the accounts, and not in the method in which the business of the firm itself was transacted.

David Wilcox, for *applt.*

Edwin B. Smith, for *respt.*

Held, That under these circumstances it was entirely immaterial as to third persons dealing with the firm what the particular arrangements in reference to the business of the firm were. The firm between themselves might restrict the rights and interests of any partner to any particular branch of the business. But such restriction would in no way affect

his obligations as a member of that firm to persons dealing with the firm. Parties might form a co-partnership providing that one of their members should not be responsible for any losses which might occur in the business of the firm; but such an agreement would not shield him from the obligation of a partner to respond to the creditors of the firm. So in the case at bar defendant King seems to have been a member of the firm exercising all the rights of a partner; and although his interest may have been restricted as between himself and the other members of the firm by the limitations of the articles of copartnership he was still a partner in the firm and consequently liable for its debts.

Oliphant v. Matthews, 16 Barb., 608; *Bank of Chemung v. Ingraham*, 58 id., 290; *U. S. Bank v. Binney*, 5 Mason, 176; *Palmer v. Elliott*, 1 Cliff., 63; *Bank v. Binney*, 5 Pick., 11; *Fosdick v. Van Horn*, 40 Ohio, 459; *Hastings v. Hibbard*, 48 Mich., 452, and *Cushing v. Smith*, 43 Tex., 261, distinguished.

In all the cases cited it appeared that the credit was given to the ostensible partners, and that at the time of extending the credit the creditor had no knowledge of the existence of the dormant partner. In the case at bar it appears that plaintiff knew that defendant King was a member of the firm or had reason so to believe, and it was with that understanding that the credit was extended to that firm.

Also held, That the appeal from the order setting aside the judg-

ment was not well taken. It appears that the judgment was entered by mistake, and upon being satisfied of that fact the court had a right to set aside and thus relieve plaintiff from the effect of that judgment in depriving it of its right of action against all the members of the firm.

Judgment and orders affirmed, with costs.

Opinion by *Van Brunt, P.J.*; *Daniels* and *Brady, JJ.*, concur.

COLLATERAL INHERITANCE TAX.

N. Y. SURROGATE'S COURT.

In re estate of Margaret McCready, deceased.

Decided Oct. 5, 1887.

Gifts, legacies and distributive shares of decedents' estates are subject to the collateral inheritance tax only when they are of the value of \$500 or upward.

Testatrix, who was a resident of New York County and died possessed of property of the value of several thousand dollars, bequeathed by her will three legacies of \$400 each to persons not within the classes exempted from taxation under Chap. 488, Laws of 1885. The question involved was whether said legacies were liable to tax.

Held, That, taking the act as a whole, whatever may be the extent of a testator's possessions such of his bequests and devises as are of less value than \$500 are not subject to tax. The title of the statute is "An act to tax gifts, legacies and collateral inheritances," and this title is well chosen to indicate in general terms the pur-

pose declared by the legislature in the body of the statute. The tax is not imposed on a testator's entire "estate" as such; it is imposed, under certain circumstances, upon each and every passing or devolution of property ordered by his will in favor of each and every beneficiary not within the excepted classes. The burden of this tax rests upon such beneficiary, and not upon the general estate of his testator; apart, therefore, from any critical examination of the somewhat obscure phraseology of the statute, it would seem probable that the legislature intended that the exemption should apply, not to such general estate, but to the legacies and devises which, save for such exemption, would be subject to tax. There is surely little reasonableness in a scheme that would relieve from taxation the taker of a \$400 bequest, parcel of a \$150 estate, but would deny such relief to the taker of a like bequest, parcel of an estate of more considerable value.

The contention that the proviso relates to the several parcels of property passing to a testator's beneficiaries rather than to the entire property of the testator himself finds support in the circumstance that the estate exempted is not an estate which is of less value than \$500, but "an estate which may be valued at a less sum than \$500." Valued by whom? The answer to this question is found in § 13, which directs the appointment of appraisers "to fix the value of property of persons whose estates shall be subject to the pay-

ment of such tax;" and, as has been stated already, the estates of decedents are not, as an entirety, subject to tax at all. The valuation referred to in § 1 is thus discovered to be the valuation of appraisers, which appraisers are not called upon under the act to value any portion of a decedent's estate except portions passing to persons of the taxable class.

It may be added that if the proviso to § 1 was intended to effect any other purpose than the relief from taxation of the recipients of small bequests, devises and distributive shares, it must have been intended to relieve persons upon whom the law casts the labor of assessing and collecting the tax from performing that labor in cases where only a petty revenue would result to the State. But how far is that object effected by the proviso here in question, assuming that its word "estate" means the estate of the decedent? If a testator leaving property of the value of \$500 or upward gives all of it except a single dollar's worth to person's exempt from the tax, and gives that dollar's worth to a person not exempt the machinery of the statute must be set in operation to collect the five cents to which the State is in such a case entitled. Herein lies an argument against any interpretation of the proviso except an interpretation that would involve the freedom from taxation of the three legacies of \$400 each in the case at bar.

The legacies are not taxable.
Opinion by *Rollins, S.*

STATUTE OF FRAUDS.
MERGER.

N. Y. SUPREME COURT. GENERAL
TERM. SECOND DEPT.

Mary D. Clark, *respt.*, v. William
R. Post et al., *exrs.*, *appls.*

Decided July, 1887.

An agreement by an assignee on a sale of real estate to hold the money paid by the purchaser until certain claims against his title were settled and to return it if it turned out that he had no title is not within the statutes of frauds nor merged in the deed, and an action may be maintained on it.

Appeal from judgment for plaintiff, entered on verdict.

Action to recover moneys paid to defendant's testator on a sale of real estate. Testator was assignee in bankruptcy of the firm of B. & Son. Pending suit to set aside a deed of real estate to Mrs. B. she conveyed the same to the assignee on condition that a composition proposed should be carried out. The composition fell through. The assignee, however, offered the property for sale claiming to have a valid title, and plaintiff became the purchaser. Subsequently testator promised plaintiff's husband, acting as her agent, that if she would take the deed he would protect her and hold the money until the claim of Mrs. B. against the property was decided and refund said purchase money if it turned out that he had no title. Subsequently Mrs. B. brought action in which it was decided that she had a good title and it was adjudged that the deeds to the assignee and to plaintiff were void. The jury, on sufficient evidence, found the

above facts. It is claimed that the agreement made by the assignee was merged in the deed.

Billings & Cardoza, for *appls.*

Marsh, Wilson & Wallis, for *respt.*

Held, Untenable. It is a well settled rule that the statute of frauds shall never be held as an instrument of fraud and oppression, and it seems that to apply the statute rigorously to this case would be to do both these things. These parties were dealing on the basis that the assignee held a valid title. Plaintiff meant to take no chances respecting the title. If she obtained no title she was to have her money back again. The assignee meant that she should take no chances; unless he meant to cheat her, he intended to give her money back to her if he gave her no title. He took the money on the express understanding that it was not absolutely his property, and would not be until the question of title was settled. Until that point was determined the assignee was the mere custodian of her money, her trustee of the money, having a purely contingent interest in it. There was no trust in the land. They did nothing with the land. The deed did not reach the land. The trust related to the money. The statute forbids no such trust as that. Here was a clear agreement for the trust of the money and it was paid over for that purpose.

There is still another view; that here was a mutual mistake of fact between these parties. Both assumed title in the assignee when

the fact was that he had no title at all. His muniments of title were void. They were deceptive. Grant that he acted in good faith, as plaintiff undoubtedly did, the result shows a mutual mistake about the very existence of the subject of the contract, i. e., the title to the land. I think plaintiff's proposition that the agreement, though by parol, was collateral to the writing and was not within the statute is sound.

Judgment affirmed, with costs.

Opinions by *Pratt* and *Dykman*, *JJ.*; *Barnard*, *P.J.*, concurs.

AMENDMENT. LACHES.

N. Y. COURT OF APPEALS.

The Bowker Fertilizer Co.,
applt., v. Cox, *respt.*

Decided Oct. 4, 1887.

A judgment was recovered by plaintiff for the proceeds of two notes given to defendant for sale and claimed to have passed out of his hands. Learning that this was untrue as to one of the notes, plaintiff had his judgment set aside and subsequently brought this action for conversion of the other note. Before the trial and a year after setting aside the former judgment the complaint in that action was amended so as to include only the note not involved in this action. *Held*, That the amendment was too late; that on learning of the facts plaintiff was bound to elect as to his remedy and to amend promptly.

Plaintiff brought an action to recover the proceeds of two notes entrusted to defendant for sale and unaccounted for by him, and in reliance upon his statement that both had passed out of his possession, which was subsequently found to have been untrue as to one of the notes. In April, 1882, judgment was entered in said action,

no answer having been interposed, for the amount of both notes, and proceedings supplemental to execution were soon after instituted. Upon defendant's examination his misstatement as to one of the notes was developed, and on May 23, 1882, plaintiff knew all the facts. Plaintiff caused its judgment to be vacated to ascertain the true amount for which it should be entered. It was not entered again and the action remained pending and the default continued when the present action was brought for the conversion of the note still remaining in defendant's hands. Plaintiff procured an order for a commission and a reference to examine defendant relative to his dealing with the notes, and in Oct., 1882, summoned the defendant to such examination. The present action was commenced after that. The pendency of the first action was pleaded as a defense thereto. On May 23, 1883, eight days before the trial thereof and after notice of trial had been served, the complaint in the first action was amended so as to limit it to that note alone which was not involved in the present action.

John L. Hill, for *applt.*

John R. Dos Passos, for *respt.*

Held, That in May, 1882, when defendant's misstatement as to the note for the conversion of which the present action was brought was developed, plaintiff was bound to elect between the then existing action and the present; that the amendment of the complaint in the first action, in

May, 1883, came too late to have any effect; it should have been made properly after the need of a choice of remedies became apparent. 17 Hun, 69.

It appeared that when the motion to vacate the first judgment was made, defendant was imprisoned under an order of arrest issued in the action in which that judgment was recovered. No execution against his person had then been issued or served. The court required plaintiff to stipulate, as a condition of vacating the judgment, that the defendant should "be permitted to make application to the court for his discharge at the time when he would have been entitled to make such application if said judgment had not been vacated, and if an execution against his body had been duly issued thereon."

Held, That this condition did not convert the order of arrest into a body execution. Its purpose and effect was to permit a motion for a discharge at a specified time, and to prevent an answer to the motion at such date that no body execution had been served; but the resultant discharge was from arrest under the order and that alone, and could not have the effect to discharge and satisfy an indefinite cause of action which had not as yet ripened into a judgment.

Judgment of General Term, affirming judgment dismissing complaint, affirmed upon first ground stated.

Opinion by *Finch, J.* All concur.

NEGLIGENCE. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Sophia Schreiber, *respt.*, v. The Twenty-third St. RR. Co., *applt.*

Decided July, 1887.

A charge is not to be judged by an isolated sentence severed from its connection with the balance of the charge, but by its general scope and the effect it must have had on the jury. If it is evident that the jury could not have been misled and the real issue was properly submitted, the verdict must stand notwithstanding some erroneous expressions in the charge.

Appeal from judgment in favor of plaintiff entered on verdict.

Action to recover damages caused by the sudden starting of a car of defendant while plaintiff was alighting from it. There was evidence that one of the horses attached to the car was restless and suddenly started, causing the car to swing round and strike plaintiff.

The court charged that "if through a defect in this turn table or a fractious or restless horse, or any inattention on the part of the driver, this car was moved in such a way as to throw plaintiff upon the ground, then defendants failed in their duty toward her, and that would be negligence which would make them responsible for her injury." The charge concluded as follows: "Plaintiff must prove her case, if she leaves it doubtful she is not entitled to recover; she must prove these facts to which I have directed your attention, namely, that this injury was caused solely by the carelessness of the driver or the persons in charge of the car."

The court refused to charge the

following request: "If the movement of the car was occasioned by a sudden and unexpected movement of the horse which happened notwithstanding the driver's care and attention to his duties, then the occurrence was one that the law designates as an unavoidable accident, and the verdict must be for defendants."

Held, That the mere fact that the horse suddenly became fractious or restless was not enough, standing alone, to charge defendant with negligence. It is true that defendant was bound to use safe and suitable means of drawing the cars, but if, without any notice of the fact that the disposition of the horse was fractious or restless and while the driver was careful and attentive to his duties, a sudden and unexpected movement of the horse occurred, in such case defendant would not be liable. There was no contention that the horse was unsuited to the service, and it was the sole defence that the accident was occasioned solely by such unexpected movement of the horse. The vice of the charge rests solely on the use of the word "or" instead of "and" before the words "fractious and restless," which might have permitted the jury to infer that such unexpected movement of the horse was sufficient alone to charge defendant.

That the request to charge was proper and ought to have been granted unless the point had already been covered by the charge. But upon a careful reading of the whole charge we think it is evi-

dent the jury could not have been misled to the prejudice of defendant. A charge is not to be judged by an isolated statement severed from its connection with the balance of the charge, but by its general scope and the effect it must have had upon the jury. If it is evident that the jury could not have been misled and that the real issue was properly submitted to the jury the verdict must stand notwithstanding some erroneous expressions in the charge. The judge having stated to the jury that plaintiff could not recover unless they found that personal carelessness on the part of the driver was the sole cause of the injury, it was not error to refuse to charge as requested. The charge, as finally made, excluded the statement previously made that the use of a fractious horse might impose a liability on defendant.

Judgment affirmed, with costs.

Opinion by *Pratt, J.*; *Barnard, P.J.*, and *Dykman, J.*, concur.

NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

William Jackson, *respt.*, v. Geo. D. Eighmie, *applt.*

Decided July, 1887.

Where property was left by plaintiff on defendant's premises and failed to find them a year afterward, defendant giving him full permission to search, *Held*, That in the absence of proof of conversion or destruction or of defendant's carelessness, defendant was not liable.

Appeal from judgment of Coun-

ty Court, affirming judgment of justice of the peace.

Action to recover the value of certain personal property, based on a charge of their loss or destruction by defendant's negligence. Plaintiff was a veterinary surgeon, who occupied an office furnished by defendant. On leaving the office in July, 1885, he left behind certain surgical instruments and medicines. The day before this action was commenced he requested a delivery of them, to which defendant replied requesting him to come and take them away. They went together to the premises and made some search but failed to find it, and defendant gave him full permission to come at any time and search and take away any property of his he could find.

G. & G. H. Williams, for applt.
J. V. W. Doty, for respt.

Held, That defendant was not liable for the loss. The property was voluntarily left by plaintiff in a place of safety subject to his own control, and could have been removed by him at any time. It was not in the personal possession of defendant and nothing but proof of gross carelessness and negligence would render him liable for its loss. There is no proof of its loss or destruction, and so there is no proof of negligence respecting the same, and it is not even claimed that the same is now in the possession or under the control of defendant. All the case shows at most is that plaintiff left some articles of personal property in the office of defendant and failed

to find them there when he looked for them more than a year afterward. No proof of conversion or destruction or carelessness of defendant, and ample opportunity to search for the same afforded by defendant, who expressed his desire for their removal from his office. The testimony fails, therefore, to place defendant in the wrong or to cast upon him any liability.

Judgment reversed, with costs.

Opinion by *Dykman, J.*; *Bar-nard, P.J.*, and *Pratt, J.*, concur.

FORECLOSURE. SALE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Stephen Tabor v. Maria A. Brundage.

Decided July, 1887.

Whether a requirement in the terms of sale that the purchaser should pay twenty-five per cent. on his bid at the sale instead of ten was so unreasonable as to justify an order for a resale depends on all the surrounding circumstances. Circumstances sufficient to require such payment.

Appeal from order denying motion for a resale.

Action of foreclosure. The premises have been sold three times; at the first sale \$7,400 was bid, but there being a misapprehension as to the size of the lot the purchaser refused to complete and a second sale was had for \$2,050. The second purchaser also failed to pay his bid, and a third sale was had for \$2,500.

There is no charge of irregu-

larity or unfairness in the last sale, but objection is made to the requirement of twenty-five per cent. on the amount bid instead of ten.

Charles H. Luscomb, for plff.

J. T. Marean, for deft.

Held, That the request was properly refused. Whether the demand for the payment of twenty-five per cent. was so unreasonable as to justify the exercise of the discretion of the court in directing a resale depends upon all the surrounding circumstances. Three times the purchasers had failed to pay their bids and complete their purchase. The last two times there seemed to be no sufficient reason for such failure, and it was quite inexpensive to the purchaser. It was quite desirable to terminate fruitless efforts to bring a sale of the property to consummation, and one effectual means to the accomplishment of that end would be the requirement of such a deposit by the purchaser as would operate as an inducement to pay the balance and receive a deed. Pecuniary interest is a powerful incentive to action, and an appeal to the motives which actuate men in matters of business was neither unwise nor oppressive in this case. The bid seems to be the value of the property and is nearly five hundred dollars above the amount bid on the second sale. Besides this there have been expenses incurred in reliance on the last sale which should in fairness be borne by the property in case of another sale, which would materially reduce

any possible advance realized on another sale.

Order affirmed.

Opinion by *Dykman, J.*; *Barward, P.J.*, and *Pratt, J.*, concur.

EMINENT DOMAIN. AWARD.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

In re petition of *Hubert O. Thompson*, comr.

Decided July, 1887.

Under Chap. 490, Laws of 1888, an award for the taking of lands is to include the entire amount awarded to a party affected thereby, and it is not necessary to state separately the sums awarded for lands taken and for damages to contiguous lands.

Mere inadequacy in the amount awarded will not avail on appeal unless the amount is so small or so great as to be palpably erroneous.

Appeal by property owners from order confirming awards on taking lands.

Proceedings to acquire lands for the Croton Aqueduct under Chap. 490, Laws of 1888. Commissioners were appointed, who held many hearings and made report of their awards. Appellants object to the report on the grounds, first, for a failure to state separately the sums awarded for land actually taken and for damages to contiguous lands injuriously affected; and, second, for inadequacy in the amount of the awards.

Charles B. Myer, for appls.

E. Henry Lacombe, for comrs.

Held, That the report of the commissioners is in full compliance with the requirements of the

statute and with the practice in similar proceedings. By the provisions of § 18 of the law referred to every owner or person interested in real estate taken or used or occupied for or affected by the construction of the new aqueduct is required to exhibit a statement of his claim for compensation for such taking, entering upon, using or occupying, and thereupon he becomes entitled to be heard touching such claim and to have a determination made by the commissioners as to the amount of such compensation. The statute contemplates but one claim for compensation, and the award of one amount therefor, and no beneficial results would accrue to either party by requiring more. A further illustration of the design of the statute to confine the award to a sum in gross is found in §§ 11 and 12. By the former the commissioners are required to ascertain and determine the compensation to be made, and by the latter the report must contain a statement of the sum determined upon as a compensation to the persons entitled to or interested in each parcel taken or affected. There is but one measure of damages, and that is the difference between the value of the land as it was and as it will be as it stands affected by the action of the city authorities under this law, and that measure produces but one sum. Different elements may enter into its constitution as different considerations may lead to its adoption, but the result of all is a consolidated amount of money. See 41 Hun, 643.

The testimony fails to disclose the adoption of any erroneous rules of compensation, and the sole objection of inadequacy can be accorded but small consideration in this appellate tribunal unless the amount is so small or so great as to be palpably erroneous. In all these cases the sums awarded seem to be the result of conservative views, and so far as we can judge from the testimony offered on both sides they seem to be fair and just.

Order affirmed, with \$10 costs in each case, besides disbursements.

Opinion by *Dykman, J.*; *Pratt, J.*, concurs.

CONTRACT. DAMAGES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Manhattan Stamping Works, *applt.*, v. Herman Koehler, *respt.*

Decided June 18, 1887.

Where the power furnished under a lease of premises with steam power is insufficient or irregular and unfit for the use of the lessee's machinery, to the latter's knowledge, he has no right to make damages by its attempted use.

Profits to arise from a continuation of the lessee's business and loss of work by his workmen are too remote and uncertain to constitute damages in such a case.

The ordinary rent of the machinery during the time of the deficiency of power is a proper item of damage, but in the absence of allegations in the complaint claiming damages on that ground evidence thereof is irrelevant.

Appeal from judgment dismissing complaint.

The complaint alleged a letting by defendant to plaintiff for the term of one year from May 1, 1885,

at a yearly rent of \$6,000, of certain premises on First avenue, in the city of New York, together with all steam power plaintiff needed in its business during said term, and that defendant knew the nature of plaintiff's business, and that such steam power was necessary for the prosecution and conduct thereof. That plaintiff occupied said premises under said agreement from May 1, 1885, until July 16, 1885, and fully complied with the terms of its agreement, but that the defendant had failed to comply with the agreement on his part by failing to furnish the necessary amount of steam power as he had agreed to do, whereby plaintiff was prevented from keeping his workmen employed, material was spoiled and shafting and belting damaged and profits lost, to plaintiff's damage \$2,000.

The answer denied the letting to the corporation, and set up an agreement of letting with one S., and alleged compliance with said agreement, except so far as it had been modified by a subsequent agreement entered into with said S. Upon the trial plaintiff offered evidence tending to establish the allegations of the complaint, and also offered to prove what the rental value of the machinery was during the time of the alleged breach of the contract as to power, which evidence was excluded upon the objection of the defendant

Maurice Rapp, for applt.

Hathaway & Montgomery, for resp't.

Held, No error. The difficulty with plaintiff's case seems to have

been that the complaint was framed upon an entirely erroneous theory as to the measure of damages. The damages arising from the destruction of material, because of the unevenness of the power, could not be recovered, as, if such was the necessary result of the use of the power as furnished, plaintiff was at fault in attempting to use the power and thus put at hazard his material, which must necessarily be destroyed because of the quality of the power furnished. Plaintiff could not make damages by the use of an article furnished, which it knew to be entirely unsuited to the uses to which it was to be applied.

The rule of damages laid down in the case of *Griffin v. Culver*, 16 N. Y., 489, is that the party injured is entitled to recover all his damages, including gain prevented as well as losses sustained; and the rule is subject to two conditions. The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract; that they must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and with respect to the cause from which they proceed. See, also, 45 N. Y., 562.

Therefore, in the case at bar, the profits which might have resulted from the continuation of the plaintiff's business were too remote to admit of a recovery. The facts sought to be proved as to the allegation that the workmen did less work, are of an equally

uncertain character, conjecture, and must be excluded from the damages recoverable, as laid down in the case cited.

The claim for repairs, which plaintiff was required to make to its machinery, seems to be amenable to the same rule as has been applied to loss of material.

It is true that questions were attempted to be put tending to show what the ordinary rent, or hire, was of the machinery during the time of this deficiency of power, which were excluded; which ruling would have been error had there been any allegation in the complaint basing any claim for damages upon this ground. But the complaint made no claim for damages upon this ground. No such issue was presented, and, consequently, the evidence offered was not relevant to any issue presented by the pleadings.

Judgment affirmed, with costs.

Opinion by *Van Brunt, P.J.*; *Daniels* and *Brady, JJ.*, concur.

BROKERS. COMMISSIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Arden S. Fitch, *applt.*, v. William Cunningham, *respt.*

Decided June 18, 1887.

Defendant, who was president of a corporation, employed plaintiff to procure a contract for the sale of goods the corporation was to manufacture. Plaintiff procured a customer and submitted to defendant a contract to get signed. *Held*, That he was entitled to his commissions, and that it was not necessary to entitle him to them that the corporation was

willing to manufacture them or that defendant had so represented.

Appeal from judgment entered upon a verdict in favor of defendant and from an order denying motion for a new trial.

Action to recover for commissions earned in the negotiation of a contract for a sale of merchandise to and purchase by the Rendrock Powder Company. The answer was a general denial.

Defendant was president of the Ravenswood Chemical Company, organized to manufacture chlorate of potash, and was about to engage in this manufacture. Plaintiff, being aware that the Rendrock Powder Company desired to purchase supplies of chlorate of potash, sent for defendant and asked him if he was prepared to furnish chlorate of potash, and if so, if he desired to make an arrangement with him to sell some. Subsequently defendant saw plaintiff and told him that his company was going to manufacture large quantities of it—several tons a day—and asked him if he could negotiate for him a contract for a considerable amount. Plaintiff told him he could do so, and subsequently reported to him that the Powder Co. would make a contract for one hundred tons at fourteen cents a pound; after some further conversation plaintiff told defendant that he did not care to go further into the negotiation if the Ravenswood Company was not strong, as he wanted his commission, and finally defendant told plaintiff that if he would get the contract he would pay him person-

ally. Plaintiff thereupon saw the Rendrock Company and reported to defendant that they would make a contract, and one was drawn and submitted to Mr. Cunningham to get signed, which was apparently satisfactory to him. In July defendant asked for time to reorganize the company. Plaintiff told him that he was willing to continue negotiations and carry them through provided he would personally pay him. Defendant does not seem ever to have reorganized the company, and refused to pay plaintiff's claim for commissions. Defendant gave evidence tending to disprove plaintiff's allegation of employment and that the terms of a contract had been agreed upon.

The court charged the jury that the question was whether this contract was negotiated; whether there was an agreement made on the part of one corporation to manufacture and the other to receive the one hundred tons of chlorate of potash.

Plaintiff's counsel thereupon requested the court to charge as follows:

"I ask your honor to charge the jury that whether the contract was ever executed or not, if Mr. Fitch performed such services as secured the assent of the Rendrock Powder Company to this contract in the terms assented to by Mr. Cunningham, and Mr. Cunningham agreed to pay Mr. Fitch a commission for rendering his services, Mr. Fitch is entitled to recover."

The court thereupon said: "He

would not be entitled to recover for his services under those circumstances unless the corporation Mr. Cunningham represented had agreed or was willing to perform the services of the manufacture of the article, or unless Cunningham had represented to Fitch that they were so willing and ready to manufacture the article."

J. P. Fitch, for applt.

Barlow & Carman, for respt

Held, Error. The Ravenswood Chemical Company was no party to the agreement between plaintiff and defendant. Plaintiff had performed his part of his contract when he secured a purchaser upon terms assented to by Cunningham, his employer, and although the Ravenswood Company was expected to do the manufacturing, yet plaintiff had nothing to do with them. His employer was defendant, and when he had obtained a customer upon the terms and conditions assented to by him his commissions were earned.

Neither is it any answer to plaintiff's claim to say that he agreed to wait until the reorganization of the new company and such new company was never formed, because plaintiff's right to his commissions had become fixed before this time, if his testimony is true, and a mere promise to wait without any new consideration in no way changed his legal position.

These facts, however, might well be considered by the jury in weighing the evidence as to performance.

It would therefore appear that the jury must have had an

erroneous view of what it was necessary for plaintiff to prove in order to entitle him to recover upon a branch of the case which may have materially affected the rights of plaintiff.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

Opinion by *Van Brunt, P.J.*; *Bartlett* and *Daniels, JJ.*, concur.

CONVERSION. HOUSEHOLD- ER. EXEMPTION.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

Harrison Chamberlin v. Adelbert E. Darrow, sheriff.

Decided Oct., 1887.

While lawful possession of personal property is evidence of such title as to support an action for conversion against a mere wrongdoer or stranger to the title, yet such possessor cannot assert such right of title against a sheriff who takes such property and sells it by virtue of an execution against him.

Treating plaintiff as an executor *de son tort* he could not maintain an action in a representative capacity and make the title which his wife had at the time of her death available against defendant.

The term householder as used in §§ 1890, 1891, Code, imports the master, or head of a family; one who has a house in which he resides, but who has no family for which he provides is not entitled to the statutory exemption.

Motion by plaintiff for a new trial on exceptions taken at Cattaraugus Circuit, and ordered heard at General Term in first instance.

Action for the alleged conversion of property consisting of a horse, cow, heifer, and some farm-

ing utensils, growing crops, etc., levied upon and sold by defendant as sheriff by virtue of an execution against plaintiff. The court directed judgment for plaintiff for standing grass levied upon and sold, but held that plaintiff was not entitled to recover for the taking and sale of any of the other property; to such ruling and the refusal of the court to submit the question in respect to his right to recover for the alleged conversion of such other property plaintiff excepted.

The evidence tended to show that the cow and heifer in question belonged to the wife of plaintiff up to the time of her death in Dec., 1885, and of that fact plaintiff gave defendant notice before the sale. The levy was made July 17, 1886. The cow and heifer were in the possession of plaintiff.

E. D. Northrup, for plff.

T. H. Dowd, for deft.

Held, That on the assumption that the property in question belonged to the estate of plaintiff's deceased wife, the rule that as against a wrongdoer or party who is a stranger to the title lawful possession is sufficient to support an action for conversion, 11 Wend., 54; 71 N. Y., 36; 103 id., 40, cannot be applied to this action. This proposition as applied to an action for conversion rests upon the ground that plaintiff has some property, general or special, in the subject of the action, 13 Wend., 63; 9 Cow., 670; 10 Abb., N. S., 104, and his possession is evidence of some property in him, and the right of recovery cannot be defeated by

showing title in another unless defendant in some manner connects himself with it. 15 Barb., 568. Here, however, defendant was lawfully proceeding to take the property of plaintiff subject to levy, and as against him plaintiff cannot assert his right to the property of which his possession was the *prima facie* evidence, and there is no other ground on which he can maintain the action.

That, treating plaintiff as an executor *de son tort*, he could not maintain the action in his representative capacity and make the title which his wife had at the time of her decease available as against defendant. This right of property in the personal representative of the deceased plaintiff does not seem to have.

It appeared that after the death of his wife plaintiff had remained until after the sale without a family in his house, and the wife of an adult son, who resided a few miles away, occasionally came to plaintiff's house, did washing, baking and such things as were necessary to put the house in order, and occasionally stayed over night with her children, but that plaintiff did not provide for them and they were not of his family.

Held, That the term householder as used in the statute has a very well defined meaning and imports the master or head of a family who reside together and constitute a household; and while plaintiff had a house in which he resided he did not have any family or person there or elsewhere for whom he provided or who constituted a

household. He, therefore, came within neither alternative and was not entitled to the exemption provided by §§ 1390, 1391, Code Civ. Pro.

Motion for a new trial denied.

Opinion by *Bradley, J.; Smith, P.J.*, and *Childs, J.*, concur.

CONSTABLE. ARREST ON EXECUTION.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Andrew J. Blakely, *applt.*, v. Charles Weaver, *respt.*

Decided Oct., 1887.

It is the duty of a constable to make search for property of the judgment debtor to satisfy an execution before making an arrest, and if he make the arrest without first having made diligent search he is liable, provided the judgment debtor has property openly visible in his possession subject to levy.

It is no good reason for failure to proceed to levy and sell because the property is insufficient to satisfy the execution unless the value of the property is so small that there is no reasonable possibility of realizing anything to apply on the judgment. The officer must satisfy it so far as he can before making an arrest.

After an arrest has been made the constable is not required to take anything but the money in satisfaction of the judgment to release the judgment debtor from custody.

It cannot be held as a matter of law that a constable is required to make inquiry of the judgment debtor whether he has property or not out of which to make the execution before making an arrest on execution.

Appeal by plaintiff from judgment entered on verdict against him.

Action in the nature of an action for false imprisonment, upon exe-

cution issued upon a judgment of Justice's Court against plaintiff for upward of fifty dollars, which execution directed the constable to satisfy the judgment out of the personal property of the judgment debtor, and if sufficient could not be found to satisfy it to arrest and convey him to jail. The alleged ground of the charge is that defendant, who as constable had the execution, arrested plaintiff without first having sought to satisfy the execution out of property, and that he refused to levy the execution on property of plaintiff which the latter offered to turn out to him; and plaintiff gave evidence tending to prove such allegation. The evidence on the part of the defense tends to prove that the constable had before the arrest made some search and inquiries and in that manner was unable to learn that plaintiff had any personal property upon which to levy the execution.

Adelbert Moot, for applt.

William B. Hoyt, for respt.

Held, That it was the duty of the constable to make search for property to satisfy the execution, and the right to arrest the judgment debtor was dependent on his failure to find property not exempt from execution belonging to him; and if he made the arrest without first having made search for property he was liable, provided the judgment debtor had property openly visible in his possession subject to levy. 4 Wend., 634.

It appeared that before the arrest plaintiff offered to turn out to defendant upon the execution

some property in his saloon, and that defendant refused to levy and sell, which was conceded by defendant's evidence. The reason given by defendant for not levying and selling was that the value of the property was but from five to ten dollars, while the execution was upward of fifty dollars.

Held, That the fact that the property is insufficient in value to satisfy an execution is no good reason for failure to proceed to levy and sell unless the value is so small that there is no reasonable possibility of realizing substantially anything to apply upon the judgment, because before proceeding to make the arrest the officer must satisfy it so far as he can out of the property of the judgment debtor. It is, however, unnecessary to determine whether defendant failed to perform his duty in this respect, and the consequences of not doing so before taking plaintiff in custody because the question is not presented by any exception.

After the arrest was made and when defendant was taking plaintiff to jail plaintiff's brother offered to turn out to defendant his horse and wagon which he was then driving for levy and sale on the execution, which defendant declined to take. The offer of plaintiff to prove the value of such horse and wagon was excluded by the court and plaintiff excepted.

Held, That the arrest having been made, the officer could not then have been required to make a levy or to accept anything other than the money to satisfy the exe-

cution and release plaintiff from custody. The evidence of value was therefore immaterial.

Defendant did not call upon plaintiff and make any inquiry of him about his property before the occasion of his arrest. The court was requested to charge the jury that diligence in searching for property required that the officer should have inquired of plaintiff before arresting him whether he had any property, which was declined and exception taken.

Held, That the propriety of such inquiry of the judgment debtor is apparent, and the omission to make it, if he had at the time such property, would be a fact properly for the consideration of the jury on the question of diligence of the officer in that respect. But there may be circumstances which would render it prudent after diligent search, without such inquiry, to make the arrest. It cannot be held as a matter of law to be the duty of an officer to make such inquiry of the judgment debtor.

Judgment affirmed.

Opinion by *Bradley, J.; Smith, P.J.*, concurs.

BONA FIDE PURCHASER.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

James Sargent, *applt.*, v. The Eureka Spund Apparatus Co., *impl'd.*, etc., *respt.*

Decided Oct., 1887.

The character of *bona fide* purchaser must be completed before his title will have protection as against outstanding equities, and his performance or payments

upon the contract of purchase, subsequent to the time he becomes affected by notice of them, will be treated as in his own wrong and not as available against such equities for any purpose; but so far as performance is made in good faith, and no further, he may have protection or indemnity for reimbursement, and for that purpose a lien for the amount so paid.

Appeal from judgment entered upon decision of the court.

The assumed facts for the purpose of this review upon the findings of the trial court are that one Warren procured letters patent for an invention of the date of June 16, 1885; that the invention of the proposed apparatus was on Feb. 2, 1885, assigned by Warren to Bigelow, and on June 19, 1885, Bigelow assigned the same to the defendant company. Prior to the assignment to Bigelow an agreement had been made by Warren with plaintiff, which as between them gave to plaintiff rights which were violated by the assignment to Bigelow; that Bigelow had no notice of this agreement giving such rights to plaintiff until April 14, 1885, and that before then he had paid upon the agreement, pursuant to which the assignment was made to him by Warren, \$983.76, and had incurred liability to pay others \$653.87. These sums did not constitute the full amount Bigelow was required by the agreement to pay for the improvement. The question is whether Bigelow, defendant's assignor, was a *bona fide* purchaser of the improvement from Warren and what consequences may follow its determination. The trial court held he was a *bona fide* purchaser at the time

he was advised of the situation, although he had then paid a portion only of the purchase money.

J. & Q. Van Voorhis, for applt.

J. N. Beckley, for resp't.

Held, That the character of *bona fide* purchaser must be completed before his title will have protection as against outstanding equities, and his performance or payments subsequent to the time he becomes affected by notice of them will be treated as in his own wrong and as not available as against such equities for any purpose. When a purchaser is advised of a prior claim of another, which denies to the seller, as against him, the right to make the sale, he should desist from proceeding further to complete his purchase, or if he thereafter proceeds in performance of his contract, do so subject to the equities of such party in whom rests the prior right. But so far as performance is made in good faith and no further he may have protection or indemnity for reimbursement, and for that purpose a lien for the amount so paid. And so far as these propositions may be applicable to the facts and situation of the parties in this action they should govern its determination. This protection to the defendant company should cover the amount of the purchase money for which Bigelow by way of performance of his contract had in good faith become liable to pay persons other than Warren and the amount actually paid him upon it before he became chargeable with notice of plaintiff's claim. Plaintiff seeks by this action the

assignment to him of one-half only of this patent that he may realize the benefit of the advantages furnished by his contract with Warren, the other half it would seem the defendant company may, if it so desires, retain subject to the provisions of such contract.

Judgment reversed and new trial granted unless both parties stipulate to modify judgment so as to give effect to the views above expressed.

Opinion by *Bradley, J.; Smith, P.J.*, and *Haight, J.*, concur.

PROBATE. JURISDICTION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

In re application for probate of codicil to will of John F. Delaplaine, deceased.

Decided June 18, 1887.

Section 1861 of the Code does not deprive the Surrogate's Court of any jurisdiction which it otherwise had, but simply confers jurisdiction upon courts to entertain an action to procure a judgment establishing a will under certain circumstances.

Appeal from decree of surrogate denying motion to dismiss proceeding on the ground of want of jurisdiction.

Testator died in N. Y. City in Feb., 1885, leaving personalty here. His will and a codicil were probated in June, 1885. About June 25, 1886, this proceeding was begun for original probate as a will of personalty of a second codicil to the will, executed holographically by testator without witnesses, but

according to the laws of Austro-Hungary, where he lived. It appeared that said codicil had been propounded for probate in Vienna and was in the archives of the court there, which would not part with it.

Motion was made to dismiss on the ground that the Surrogate's Court had no jurisdiction to grant original probate without production of the instrument. The motion was denied.

Michael A. Cardozo, for applts.

Lucien B. Chase, for applt. Chase.

Joseph A. Welch, for the executor.

H. W. Taft and *D. H. Chamberlain*, for the petitioners.

Held, No error. Section 2476 of the Code seems to be substantially an equivalent to the section of the Act of 1837, referred to in *Russell v. Hart*, 87 N. Y., 19.

The decision, therefor, in the case above mentioned is distinctly to the effect that the production of an original will before commissioners appointed by the surrogate to take evidence is substantially a production of the will before the Surrogate's Court, and, therefore, the provisions of the Code which appear to require the production of a will in any case before the surrogate, are complied with by the production of the will before commissioners appointed by the surrogate to take proof in reference to its execution.

The case of *Younger v. Duffy*, 94 N. Y., 533, does not in any respect conflict with this view. The question there before the court

was as to the jurisdiction of the Supreme Court to entertain an action to prove a will the original of which remained on file in the archives of the notary's office at the city of Cadiz in Spain, from which the same could not by reason of the laws of Spain be taken for the purpose of being admitted to probate under the laws of the State of New York or for any other purpose whatsoever. The court simply decided that the fact that the will could not be obtained for production in the Surrogate's Court of Richmond County gave the Supreme Court jurisdiction to entertain an action under the provisions of § 1861 of the Code of Civil Procedure. But it was not decided and it was not intended to be decided that the Surrogate's Court was deprived of jurisdiction to entertain proceedings for the probate of the will simply because the will itself was not produced before the surrogate of that county.

There is no evidence of any intention upon the part of the legislature by the enactment of § 1861 to deprive the Surrogate Court of any jurisdiction which it otherwise had, but simply to confer jurisdiction upon courts to entertain an action to procure a judgment establishing a will under certain circumstances.

It would be a forced application of the rule of repeal by implication to hold that because of supposed inconsistencies between the provisions of § 1861 of the Code and the jurisdiction which the Surrogates' Court had been accustomed to exercise, and which they would

be undoubtedly held to have the right to continue to exercise were it not for these apparent inconsistencies, the jurisdiction of the Surrogate's Court had been thereby abridged.

Full force and effect can be given to § 1861 without in any respect infringing upon that jurisdiction which had been recognized by the Court of Appeals to exist in Surrogates' Courts.

Decree affirmed.

Opinion by *Van Brunt, P.J.*; *Daniels* and *Bartlett, JJ.*, concur.

LIFE INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Lucy F. Wyman, admrx., v. The Phoenix Mut. Life Ins. Co. of Connecticut.

Decided June 18, 1887.

Chapter 341, Laws of 1876, prohibiting the forfeiture of policies unless thirty days notice is previously served, applies to policies issued before but which have been renewed after the passage of said act.

Motion by plaintiff for new trial on exceptions ordered to be heard at General Term in the first instance.

Action on a policy of life insurance, on the life of plaintiff's intestate. The policy provided that it should be void if the premium or any note for the cash part thereof or the interest should not be paid when the same were due. The premium which became due Oct. 25, 1884, was not paid at that time. On Nov. 3, 1884, the intestate

had an interview with defendant's agent in relation to his right to a paid up policy, but there was a difference between them as to subsequent payments on notes, and a stipulation was signed extending the time thirty days for the assured to decide whether he would take such a policy, but no agreement was had as to the preceding default. The assured died Nov. 8 and his son paid said premium Nov. 10, the company being in ignorance of such death.

It appeared that the policy was issued in Oct., 1872, and that the assured made default in the payment of a part of the premium on April 25, 1884. He requested an extension, which was denied, the agent having no authority to grant one, but subsequently a payment thereof was made and accepted.

Samuel Greenbaum, for plff.

Philip G. Bartlett, for deft.

Held, That this policy had become null and void, unless it was saved by the intervention of the statute hereafter referred to, from and after Oct. 25, 1884, by the failure to pay the annual premium. See 82 N. Y., 543; 93 id., 80; 88 id., 441. And that it was not revived or continued by the payment made by the son as long as the fact of his father's death was not known to the agent. 105 U. S., 355.

That the failure of the assured to pay the April premium had the effect under the provisions of the policy to forfeit it, as the statute referred to did not then apply to it

and the agent himself had no right to revive it without the action of the superior officers of the company. But it is nevertheless to be inferred from the circumstances that the policy was afterward reinstated and up to April 25, 1884, regarded as and was an insurance in force and effect, because of this April premium having been accepted by the company, and the policy in that manner in due form renewed from the time when the payment was made. That the object of the payment was to avoid the forfeiture and secure a renewal of the policy is disclosed by the evidence of the agent. And the result of this renewal was after that to place this policy within the control of Chap. 341, Laws of 1876, and to render it afterward incapable of forfeiture without the service of a notice of not less than thirty days to the assured, stating the amount of the annual premium or interest due, and when due, on such policy, and the place where such premium or interest might be paid. That such a notice was served was neither intimated nor proved on the trial. And while this policy was issued before the enactment of the statute, as long as it was renewed after such enactment, it was brought within its provisions. For it has been made to include not only policies issued after its enactment, but also those which may afterward be renewed, and this policy from the evidence was so renewed. There was no legislative inability to include within

the act such policies as should be renewed and continued in force after its passage. For while not in form a new policy after the insurance had become null and void because of the non-payment of the premium and the renewal of it by the acceptance of the money, yet in legal effect the policy would be otherwise, and it must have been so intended by the legislature in making the act applicable to a renewed policy. It has not been required by the act that the entire annual premium shall be defaulted to bring the policy within the provisions of the law relative to notice, but it is sufficient that the case shall be one of "non-payment of any annual premium or interest or any portion thereof," to entitle the assured to this notice before the renewed policy may be avoided.

The default of the assured in April, 1884, was of some portion of the annual premium. That under the provisions of the policy worked a forfeiture when the assured failed to pay the amount. It for all practical as well as legal purposes then ended the insurance, and as this part of the premium was afterward accepted and undoubtedly received by the company the policy was thereby from that time renewed and rendered subsequently non-forfeitable without the service of this notice.

The objection that the act does not include this insurance company is not tenable, for it has been made to include all life insurance companies doing business in this State, and this policy was issued in this

State and the company had and maintained an agency here, which brought it within the authority and control of the act.

Verdict set aside and new trial ordered, costs to abide event.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Brady, J.*, concur.

RECEIVERS. PRIORITY.

N. Y. COURT OF APPEALS.

Raht, exr., v. Attrill et al., Bliss et al., appls.

Decided Oct. 4, 1887.

The fact that a corporation which is dissolved was owing debts for labor creates no equity for their payment in preference to the bondholders where the proceedings to dissolve were had before the passage of the act of 1885.

The fact that the workmen had become riotous and threatened to burn the property will not render the debt incurred by the receiver for their payment a necessary expenditure incurred in the care or preservation of the property in the absence of proof that attempts were made to secure the intervention of the public authorities to suppress the riot.

This action was brought to foreclose a mortgage. It appeared that the Rockaway Beach Improvement Company was formed for the purpose of erecting a hotel and managing the same. Lands were purchased subject to a mortgage and another mortgage to S. as trustee was executed thereon to furnish means for the erection of the buildings. In the summer of 1880, within six months after the organization of the company, all of its available means were exhausted, and it was largely in debt for labor and materials. One of the stock

holders brought an action to dissolve the company, and a receiver was appointed therein. It appeared that prior to the appointment of the receiver the company had expended more than \$350,000, raised on the sale and hypothecation of its bonds secured by the mortgage to S., and the hotel building and structures were but partially completed. The company owed for labor, material and furniture about \$300,000. The receiver was authorized by an *ex parte* order, made in the action in which he was appointed, to borrow \$130,000 for the "purpose of paying the employees of said company," and to issue therefor certificates, containing on their face a declaration that the debt represented thereby was "a debt of the receiver incurred for the benefit and protection of the property in his hand and a first lien thereon prior to the mortgage" to S. In May, 1881, while the suit to dissolve the company was pending, the attorney-general brought an action to dissolve it. This action was brought in Sept., 1881, to foreclose the original purchase-money mortgage, and on a sale of the property under a judgment therein there was a surplus of \$86,283.39. The trustee and bondholders were not made parties to the action brought by the shareholders to dissolve the corporation, and had no notice of the application of a receiver for authority to borrow money.

John L. Cadwalader, Clarence D. Ashley, James McNamee and Edward S. Clinch, for appls.

Lewis Sanders, for respts.

Held, That there was no justification for subverting and postponing the prior legal lien of the mortgage creditors without their consent to the debts authorized to be created by the receiver. The fact that the company was owing debts for labor created no equity for their payment in preference to the bondholders. 103 N. Y., 245; 117 U. S., 456.

On the application for the distribution of the surplus moneys, the validity of the order authorizing the receiver to issue certificates and giving the holders thereof priority over the mortgage was sought to be upheld on the ground that between 800 and 1,000 workmen, whose wages were in arrears for three months, but who had continued work under promises of payment, all of which had been broken, had reached a state of absolute destitution and starvation; that at the time the order was made they had stopped working, but had remained on the premises and had become riotous in their language and demeanor, and threatened unless paid to burn the hotel buildings and property therein. The referee found that unless funds had been raised on the certificates, and the receiver enabled to pay off the arrears of wages the hotel and other property of the company would in all probability have been destroyed or seriously injured. It did not appear that the receiver or the company attempted to secure the intervention of the public authorities to suppress the apprehended disturbance

or to arrest those who threatened to burn the property.

Held, That the debt incurred by the receiver could not be regarded as a necessary expense incurred in the care and custody of the property or in its preservation; that it ought not to have been assumed that the ordinary agencies of the law were inadequate to the situation, or that the law operating through its regularly appointed channels was impotent to control the situation.

Wallace v. Loomis, 97 U. S., 146; Fosdick v. Schall, 99 id., 235; Barton v. Barber, 104 id., 126; Miltonberger v. Logansport R. Co., 106 id., 286; Union Trust Co., v. Souther, 107 id., 591; Burnham v. Bowen, 111 id., 776; Union Trust Co. v. Ill. Mid. RR. Co., 117 id., 456, distinguished.

Order of General Term, reversing order confirming order of referee, modified by making order of reversal absolute.

Opinion by *Andrews, J.* All concur.

PLEADING. JURISDICTION.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Richard G. Berford, *respt.*, v. Demas Barnes, individually and as assignee, *applt.*

Decided July, 1887.

The State courts have jurisdiction of an action against an assignee in bankruptcy to recover a dividend declared by the court, but retained and not paid over by the assignee.

In such an action the defendant may be named both individually and in his official capacity.

Action from judgment and order overruling demurrer to complaint.

The complaint charged that defendant was appointed assignee in bankruptcy of two persons named V. and accepted the trust; that a dividend in favor of one H. was declared for which defendant received credit in his accounts; that he falsely represented to H. that his claim had been disallowed and was barred by the statute of limitations; that he thereafter drew the amount of the dividend from the funds of the estate and mingled the same with his own at his bankers; that H. died in ignorance of the facts and that his administratrix first discovered them about May 1, 1885, and assigned the cause of action to plaintiff. That plaintiff had demanded payment, which was refused. The complaint demanded judgment for an accounting and payment.

Defendant demurred both individually and as assignee on the grounds, that the complaint does not state facts sufficient to constitute a cause of action; that the court has no jurisdiction of the supposed cause of action; and that there is a misjoinder of causes of action against defendant individually and as assignee in bankruptcy. The demurrers were overruled.

Hill, Wing & Shoudy, for applt.

Roger M. Sherman, for resp't.

Held, No error. No want of capacity on the part of plaintiff to sue appears on the face of the complaint, and that is therefore not available as a ground of de-

murrer. The trust in respect to the chose in action devolved on the administratrix of H. by operation of law and was duly assigned to plaintiff, who is a proper party. 84 N. Y., 83; 26 Hun, 382.

That the court had jurisdiction of the parties is well settled by authority. The suit is against an assignee in bankruptcy to recover a dividend declared by a bankruptcy court which it is alleged the assignee has withdrawn from the funds of the estate after he has claimed and received credit for the payment of the dividend. Such a suit is clearly within the adjudicated cases. 91 U. S., 531; 55 N. Y., 150.

The point that there is a misjoinder is not well taken. The complaint is in equity and names the party who holds the legal title to the fund as well as the person who has interfered with the trust. Assuming, therefore, that Demas Barnes as assignee is one person, and Demas Barnes individually is another, both are properly named in the complaint in order that the decree may bind him in both capacities. Story Eq. Pldg., 9 Ed., 431, § 528; 17 Hun, 269. Both demurrers are to the entire complaint, and it follows that it should be overruled if either of the causes of action are well pleaded. 30 Hun, 582. It cannot be said that no cause of action has been stated in the complaint when defendant has asserted by his demurrer for misjoinder that two well pleaded causes of action are improperly joined. *Sullivan v. RR.*, 1 Civ. Pro.

But one cause of action only is stated in the complaint. One fund is sued for, and a judgment of accounting for a specified sum of money is demanded. In any view of the case the judgment against Demas Barnes individually should be affirmed.

Judgment affirmed, with costs.

Opinion by *Pratt, J.; Barnard, P.J., and Dykman, J.*, concur.

PROBATE. APPEAL.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

In re will of Margaret Hannah, deceased.

Decided Sept., 1887.

The power given by Code, § 2586, to the appellate court to admit further testimony or documentary evidence and to appoint a referee should be cautiously exercised. It seems that if one side be permitted to introduce further testimony the other side should have the same privilege.

Probate of this will was refused by the surrogate. Appellant now moves under § 2586, Code Civ. Pro., to postpone the argument of the appeal from the decree so that the testimony of certain witnesses be taken by commission.

H. T. Terry, for the motion.

Hughes & Northup, opposed.

Held, That the motion should be denied. Probate was refused on the ground of the mental incapacity of testatrix. On the hearing below testimony was given by the contestant, a daughter of deceased, that there had been little

correspondence between testatrix and the parties, who lived in Scotland, entitled in remainder under the will in case the daughter died without issue. The object of this was to show weakness of mind in testatrix. Appellant, who is one of the Scotch relatives, now desires to show that there had been correspondence. It is plain that the power given by Code Civ. Pro., § 2586, should be cautiously used. It practically opens the case. Of course, if one side can introduce new evidence before an appellate tribunal it would seem unjust not to permit the other side to do the same.

The evidence proposed here does not seem to us important enough, upon the question of imbecility, to justify its admission. Whether testatrix or her family corresponded with her relatives in Scotland does not bear much upon her competency.

Motion denied.

Opinion by *Learned, P.J.; Landon and Williams, JJ.*, concur..

MUTUAL INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Magdalena Kepler, respt., v. The Supreme Lodge Knights of Honor, applt.

Decided July, 1887.

In the absence of any specification of form of designation in the by-laws of the company, the making of a will by the assured after the decease of the beneficiary named, devising all his property, which

will is given to the officers of the lodge with information that it is intended to pass the insurance and retained by them, is a sufficient designation of the beneficiary.

Appeal from judgment in favor of plaintiff.

Action on a benefit certificate issued by defendant on the life of one M. Defendant was incorporated under the laws of Missouri but does business through subordinate lodges. M. was married to plaintiff's mother in Germany and came to this country. They had no children. He became a member of defendant and received a certificate naming his wife as beneficiary. She died and no change was made in the certificate; but afterward M., who was an illiterate man, had his will drawn leaving all his property to plaintiff, and upon the back of it had a letter written to one of the officers of the lodge, to whom he delivered it and who retained the same. M. also told the reporter of the lodge that the insurance was to go to his step-daughter, plaintiff. Thereafter M. with the assistance of plaintiff kept up the insurance until his death, when the will was proven and the grand lodge refused to pay. M. left no other relatives and very little other property. The by-laws of defendant prescribe that in case of the death of all the beneficiaries designated by the member before his decease, if he shall make no other disposition thereof, the benefit shall be paid to his heirs, and if no person shall be entitled to receive it by the laws of the order it shall revert to the

widow and orphan benefit fund.

Held, That M. disposed of this fund and it did not revert. It is plain that testator intended to dispose of this fund by his will, when all the facts and circumstances surrounding the transaction are considered. He had no other property upon which the will could take effect. It is true, the will does not specifically mention the fund, but he had kept up the insurance after his wife's death with the assistance of his step-daughter and undoubtedly intended that she should have the benefit of it, and as clearly supposed that he had secured it to her by the will and by taking steps to notify the lodge. So far as appears he had no relations and no object of bounty except plaintiff, and it is not at all probable that he, together with plaintiff, would struggle to keep up the insurance for the benefit of the widow and orphan fund.

In *Hellenburg v. Dist. No. 1, I. O. B. B.*, 94 N. Y., 583, there was no general power of "disposition" as in this case, and hence the court held that the assured having only the power to designate a person to receive the fund, and that person having to be designated in a formal manner prescribed by the by-laws, and said designation having to be "to his said lodge prior to his decease," that these requirements were not met by a clause in his will leaving the fund to his brother. But even in this case the court says, in substance, that the will would have operated as a sufficient designation if it had been brought to the notice of the

lodge during the lifetime of the assured. That in that case it would have been good as a designation, although not yet operative as a will," but that it not being brought to the lodge's notice till after the assured's death it was ineffectual.

In the present case the will was sent to the proper officer of the lodge within a day after it was executed, and the reporter of the lodge was apprised of its contents by M. and of the understanding that it conveyed his insurance to his step-daughter right after its execution. The delivery of the will to the proper officer of the lodge and the contemporaneous statements made by the assured to the reporter, and the retention of the will by said lodge without any objection to the form and manner of designation, constitute a waiver of any defect or irregularity in such designation or disposition. If the paper was regarded as imperfect it was the duty of the officers of the lodge to return it to the assured with notice of defect.

Judgment affirmed, with costs.

Opinion by *Pratt, J.*; *Dykman, J.*, concurs.

POLICE. REMOVAL.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

The People ex rel. Daniel Blake v. Richard B. Whittemore et al., Police Comrs.

Decided July, 1887.

On a trial of charges against a police officer before the commissioners he is entitled

to introduce any testimony to disprove the charges, and a refusal to allow him to do so is error.

Certiorari to review proceedings of respondents suspending relator from the rank and office of captain of police of Richmond Co., and reducing him to the rank of sergeant.

The charge against relator was a general one for insufficiency and dereliction of duty in failing to have the orders of the police board carried into effect, and the specifications were of the same general nature charging a failure to enforce the excise laws.

The testimony was directed to proof of the fact that saloons and taverns were open for the sale of liquors on Sundays and that men were intoxicated in the evening in the streets. There was no effort to show that any of these occurrences took place in his presence or were brought to his notice or that he ever omitted his duty in any instance.

Relator offered proof of his fidelity to his official duty and his fitness for the position, which was rejected. He asked to examine the president of the board as a witness, and his request was denied and that officer refused to be sworn.

Thurston, Earle & Kiendl, for relator,

C. A. H. Bartlett, for respts.

Held, Error. When it is considered that the powers with which relator was vested were executory and not judicial, it will readily be understood that in the main the enforcement of the excise

laws was entirely beyond the scope of his authority. True, he could cause arrests for intoxication in public streets and for other specific offences against the law committed in his presence, but he was not charged with any dereliction of duty in these respects.

So marked and erroneous were the rulings of the board in the exclusion of testimony beneficial to relator that they cannot be credited to error of judgment entirely, and while it is true that a wide discretion was vested in the commissioners in the determination of the main question, yet relator had some legal rights, and among the most sacred of these was the right to introduce any legitimate proof to establish his freedom from fault and his innocence of the charge brought against him. He was entitled to a trial and that privilege secured him the right to a fair trial and opportunity to introduce any testimony to demonstrate the falsity of the charge brought against him.

There is neither charge nor proof of the incompetency of relator nor of his unfitness to fill the position of captain, and the findings of the board and the reduction of relator to the rank of sergeant were unsupported by testimony and should be reversed and relator restored to his rank and place as captain.

That in view of the conclusion reached it is unnecessary to review the proceedings of the board dismissing relator for refusal to obey orders after he had been reduced.

Proceedings reversed, with costs, Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

RAILROADS. JURISDICTION.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

In re petition of the New York Cable Co.

Decided June 18, 1887.

Before a property owner can be legally asked to consent to the construction of a railroad under the rapid transit act there must be placed before him the necessary materials which the statute prescribes; and where such necessary materials do not exist at the time such consent is asked, there is no legal application for consent and no refusal and the court is entirely without jurisdiction of proceedings under said act.

Motion for reargument and order to show cause why the report of commissioners should not be remanded to them for further hearing.

Petitioner was incorporated under Chap. 606, Laws of 1875, and endeavored to obtain the consent of the property owners to consent to the construction of its road on certain streets and avenues, but failed to get the consent of a sufficient number on some of said streets. It then took proceedings and procured the appointment of commissioners who reported in favor such construction. The General Term decided that certain portions of the road should not be built, and the Court of Appeals affirmed its order, and held that the commissioners must exercise

the power of deciding upon the plans of construction and that such decision had not up to that time been made and consequently had not been made at the time the consents were applied for, the refusal to grant which was supposed to have conferred jurisdiction on this court. It further held that such decision and determination as to plans of construction was necessary in order that those who consent to the construction of the road, whether they be the local authorities, the property owners or the Supreme Court commissioners, may know to what kind of a road they are consenting, to what degree the streets will be obstructed thereby, of what efficiency the proposed mode of construction is capable.

Thereafter the judgment of the Court of Appeals was made the judgment of this court, and the commissioners amended the articles of association to conform to the objections pointed out.

E. P. Wheeler, J. H. Choate and Robert Sewell, for motion.

A. J. Vanderpoel, Waldo Hutchins, W. C. Trull et al., opposed

Held, That the court has no jurisdiction of this proceeding. It appears from the act under which this proceeding is taken that the jurisdiction of this court depends entirely on the refusal of the owners of one half in value of the property bounded on that portion of the street or highway on which it is proposed to construct or operate the railway or railways to consent thereto. In the case at bar the Court of Appeals has de-

cided that the plans for the construction of the road claimed to have been adopted by the rapid transit commissioners were fatally defective and were no plans at all and did not comply in many material respects with the requirements of law. That such pretended plans attempted to give to the board of directors of the corporation the right to determine questions the exclusive exercise of which belonged to the commissioners. That they utterly failed to convey that information to the property owners on the route to which they were entitled before they could be asked to give their consent. It may be that because of this very want of knowledge as to the plans proposed to be used in the construction of these roads the want of any determination as to whether the roads should be surface or elevated, that the property owners along the proposed routes have refused their consent. The Court of Appeals says that the necessary materials were not before the property owners when they were applied to for their assent in this matter to enable them to form an intelligent judgment whether the scheme proposed should or should not be assented to.

As this court acquires jurisdiction only because of the refusal of property owners to consent, there must be placed before the property owners before he can legally be asked to consent those necessary materials which the statute has prescribed as being necessary for him to form an intelligent

judgment as to the merits of the proposed scheme, and as, under the decision of the Court of Appeals, such materials did not exist at the time the property owners were applied to for their consent in this matter, no legal application for such consent has ever been made, there has been no refusal, and this court is entirely without jurisdiction.

Motion denied, with costs.

Opinion by *Van Brunt, P.J.*; *Brady and Daniels, JJ.*, concur.

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FORECLOSURE. BONA FIDE HOLDER.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Willard E. Masten, applt., v. Jane Reilly et al., respts.

Decided Sept., 1887.

J. B. R. made his note to the order of T. R., who indorsed it for the maker's accommodation, and subsequently J. E. R. and G. H. B. successively became accommodation indorsers. J. E. R., wife of J. B. R., and owner of real estate, mortgaged it to secure G. H. B. The maker and first indorser paid the note. G. H. B. assigned the bond and mortgage and it came to plaintiff. It did not appear that plaintiff was a holder for value. *Held*, That he could not recover.

Joseph B. Reilly made his note to the order of Thomas Reilly, who indorsed it for accommodation, and subsequently Jane E. Reilly and George H. Beckwith successively became accommodation indorsers. To secure Beckwith Jane executed to him a bond and mortgage for a definite sum. After the

note became due the maker paid part and Thomas Reilly the residue, and to him the holder surrendered the note. Beckwith, who had paid nothing, then assigned the bond and mortgage to Thomas; Thomas assigned them to Lawrence Reilly and he to plaintiff. Plaintiff begun this action to foreclose. The referee decided that there was nothing due. The mortgaged property belonged to Jane Reilly.

Bentley & Thompson, for applt.
John C. Stein, for respts.

Held, That the referee was correct. Beckwith paid nothing; had no right of action on the mortgage and could assign none. It does not appear that plaintiff was a purchaser for value of the mortgage. And any such assignment is of course subject to all equities. Further, Jane was an indorser subsequent to Thomas and he could not call upon her. She did not undertake to secure Thomas, and pledged her property only as security to Beckwith, and not for the payment of the note. If Joseph B. Reilly, who was the husband of Jane, had been the owner of the property the equities would have been sufficient. And even if Beckwith had paid the note and reimbursed himself by the mortgage the note would practically have been paid by Jane, and to her Thomas would then have been liable. He cannot now by an indirect method compel her to indemnify him.

Judgment affirmed.

Opinion by *Learned, P.J.*; *Landon and Williams, JJ.*, concur.

MERGER. DOWER.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Hannah Moriarta, *applt.*, v. William S. McRae et al., *respts.*

Decided Sept., 1887.

B and wife conveyed property by a grant in fee reserving an annual rent, but also providing that on any rent day the grantee might pay a gross sum in extinguishment of all future rent. Plaintiff's husband acquired the grantor's rights and assigned them to H., plaintiff not joining in the assignment. H. conveyed to A., and the latter soon after acquired the grantee's rights. In an action by plaintiff for dower, *Held*, That the estate was a defeasible fee, and that when A. acquired the rights of both grantor and grantee there was a merger, which barred dower. This merger, though not so in form, was in fact equivalent to the payment of the gross sum which it was stipulated should defeat the estate.

This was an action for dower in certain premises. Augustus Bockes and wife in 1854 conveyed one of the lots to one Mallory and the other to one Tabor, in each case by a grant in fee reserving an annual rent, with power to re-enter; but there was a further provision given to the grantees to pay on any rent day a specified sum in extinguishment of all future rents. In 1855 plaintiff's husband acquired the grantor's rights in these grants and in 1856, plaintiff not joining in the assignment, he assigned them to one Hall. In 1858 Hall assigned his interest in the grants to James M. Andrews, who soon after acquired all the rights of Tabor and of Mallory. Andrews conveyed to defendants in 1869, who went into and remain in possession. Plaintiff's husband

died before Jan., 1886. He never had possession. The complaint was dismissed.

Esek Cowen and Jesse Stiles, for *applt.*

P. C. Ford, for *respt.*

Held, That the estate of Augustus Bockes was a defeasible fee, defeasible on payment of a gross sum. He and his wife conveyed only a defeasible fee; and the widow of their grantee was entitled to dower in a fee liable to be defeated at any time. The same may be said of the widow of the subsequent grantee. The fee was defeated before plaintiff was entitled to dower. It is true a gross sum was not paid, but an equivalent transaction took place. The owner of the rent became by purchase the owner of the property on which it was charged. This was a merger.

Judgment affirmed.

Opinion by *Learned, P.J.*; *Landon and Williams, JJ.*, concur.

ROBBERY. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People, *respts.*, v. John Foley, *applt.*

Decided May 13, 1887.

Where the complainant at first identifies another person as the one who robbed him, but on discovering his error corrects it and explains the reason therefor, and adheres to his subsequent identification of defendant as the robber, the reliability of his evidence is for the jury to determine whether it is contradicted or not.

When the property is taken by force the degree of force is not material.

Appeal from judgment convicting defendant of the crime of robbery in the second degree.

At the Police Court the complainant selected another as the person who robbed him, but when he had a full view of defendant at once declared him to be the culprit. After his identification of defendant the complainant adhered to his statement that he was the man and was not at all in doubt about it, and explained the cause of his error to the jury. The court submitted to the jury the question of the reliability of the complainant's testimony.

G. M. Curtis, for applt.

McKenzie Semple, for respts.

Held, No error. If complainant had not committed the error mentioned in selecting another person no question could be properly presented against the accuracy of his judgment and knowledge on the subject. When such discrepancies mark the trial, the credibility of the witness, the value, the reliability of his evidence must be left for the decision of the jury whether contradicted or not. There is no other method of disposing of the charge to which the testimony relates, and we must accept the result unless some established rule of law has been violated or the preponderance of evidence is clearly in favor of the appellant. Here the appellant denied the commission of the offense charged, but he was found in the vicinity in which the robbery took place and had before been convicted of a felony. His testimony was doubtless received with great misgivings, and

it may be that the evidence of identity, though regarded as slight, was magnified in strength and importance by appellant's unfortunate history.

His conviction for robbery in the second degree was correct; §§ 225, 226, leave no doubt upon that subject. When the property is taken by force, the degree of force is immaterial. This is the rule now, whatever it may have been heretofore.

Judgment affirmed.

Opinion by *Brady, J.*; *Van Brunt, P. J.*, and *Daniels, J.*, concur.

EXECUTORS. TRUSTEES.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

In re estate of *Hiram Hutchinson*, deceased.

Decided June 18, 1887.

Provisions of will sufficient to indicate an intention that the executor should also act as trustee.

A provision in a will empowering the executor to terminate any business connection which existed or might continue by virtue of arrangements made by testator gives the executor no authority to continue the business and subject the estate to the hazards of commercial business.

Appeal from decree of surrogate removing trustee and executrix. It is claimed that the decision is erroneous because, first, the executrix, *Mrs. H.*, was not a testamentary trustee and therefore not removable as such; and second, that even if she was, no grounds existed for the action of the surrogate.

The will devised the estate to the executrix, but it contained other provisions, as stated in the opinion.

T. W. Dwight and C. H. Hatch, for applts.

C. J. Wells, for respt.

Held, That there was an evident intention on the part of testator that his executrix should also assume the duties of testamentary trustee. It is urged that testator intended to create a life estate in his executrix with remainder over, which estate was charged with certain liens. But it is difficult to reconcile this view with the provisions of the will which could only be carried out by a trustee. The provision for Mrs. S.; the setting apart in some safe investment the sum of \$20,000 for Charles, to be paid to him when he should attain the age of twenty-one years, the interest on which was to be applied to the expense of his maintenance and education; the direction to pay or invest in some safe or profitable manner the sum of \$5,000 for the separate use and benefit of testator's sister Mary during her life and of her daughter after her death; all required the intervention of a trustee, and as such testator intended his executrix to act. The whole scope of the will, indeed, seems to imply that the widow of testator is not to have an absolute life estate in his estate, but she is to hold the same in trust for her own support and for that of testator's children, and that she is to manage the same as executrix and not as life tenant.

Testator was engaged in busi-

ness at the time of his death, and by his will empowered his executrix, by and with the advice of his sons, to terminate any business connection which existed at his decease or which should continue after by virtue of arrangements made by him during his lifetime. The executrix in 1876, in order to cut off claims of petitioner's husband, entered into a copartnership which was only to commence in 1882 and terminate in 1892. This was one of the grounds of complaint and does not appear to have been condoned or assented to by petitioner.

Held, That the clause in the will above set forth gave no power to the executrix to continue any business beyond such as might be necessary because of arrangements made during testator's lifetime. The idea that the executrix had the right to continue the business of her husband indefinitely and to risk his whole estate therein does not find countenance in the language of the will. The only language in the will which is claimed to support this view is the power to terminate any business connections which existed at the time of the death of testator. This clause was entirely unnecessary. Such connections terminated by the death of testator without any action on the part of his executrix and could only continue by virtue of some agreement on his part that they should so continue after his death, and even such business connections the executrix was authorized to terminate. Upon the right to terminate cannot be built

up a right to continue, where such a continuance would be an express violation of duty. It must be a very plain provision in a will which will authorize an executor or trustee to subject a large part of an estate to the hazards of a commercial business, and no such authorization can be found in the will of H.

It may be true, and it probably is, that all of the children were willing to connive at the violation of duty by the executrix as long as it seemed their interest so to do; but that does not deprive them of the right of objection as to acts which they have not condoned or of the right to insist that the estate shall not be subjected to further hazard. The question as to whether or not Mrs. H. had a right to all the profits has no bearing on this question, as any one of the *cestuis que trust* had the right to demand that the body of the estate should not be put in peril.

Decree affirmed, with costs.

Opinion by *Van Brunt, P.J.*; *Bartlett* and *Lawrence, JJ.*, concur.

LARCENY. INDICTMENT.

N. Y. COURT OF APPEALS.

The People, *respts.*, v. Dumar, *applt.*

Decided Oct. 4, 1887.

To sustain an indictment for feloniously stealing, taking and carrying away certain goods there must be proof of a taking against the will of the owner; proof that the goods were obtained by means of false representations and a false writing is not sufficient.

The indictment must state the crime and the act constituting it; if either one of several acts constitutes the crime, the several acts must be separately stated in different counts.

Reversing S. C., 25 W. Dig., 191.

Defendant was convicted of the crime of grand larceny in the second degree. The indictment charged that defendant "unlawfully and feloniously did steal, take and carry away contrary to the form of the statute," etc., certain goods. Upon the opening of the case the counsel for the prosecution stated that "the people would show that the defendant had committed the crime of grand larceny by obtaining from Carter certain personal property by false representations and a false writing." Defendant's counsel thereupon moved for his discharge on the ground that the case stated varied from the crime charged. The motion was denied. Evidence was given by the prosecution showing that the goods had been obtained upon a sale on credit induced by fraudulent representations and pretenses, and there was no evidence of any taking against the will of the owner. At the close of the evidence for the prosecution the motion for a discharge was renewed and denied.

P. Chamberlain, Jr., for *applt.*
George A. Burton, for *respt.*

Held, Error; that the evidence was not sufficient to sustain the allegations of the indictment; that under the indictment proof of a taking against the will of the owner was necessary. 5 Hill, 294; 8 Cow., 238; 45 N. Y., 387; 77 id., 114; 94 id., 90; 99 id., 662.

Under the Code of Criminal Procedure, § 275, the indictment must charge the crime and also state the act constituting it; the omission of either is fatal. If either one of several acts constitutes the crime the several acts must be separately stated in several counts.

People v. Willett, 102 N. Y., 251, distinguished.

Judgment of General Term, affirming judgment of conviction, reversed.

Opinion by Danforth, J. All concur, except Ruger, Ch. J., not voting.

RECEIVER. BAR.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Erastus S. Spencer, rec'r., *respt.*,
v. Harriet B. Berdell, *applt.*

Decided June 18, 1887.

The judgment debtor brought an action to redeem certain premises and filed a *lis pendens*. Defendant set up an absolute title. Subsequently plaintiff was appointed receiver in supplementary proceedings and brought this action to recover possession of said premises. The former action resulted in a judgment in favor of defendant. *Held*, That plaintiff was bound by all the proceedings in the former action and that the judgment in that action was a bar to the maintenance of this action to recover possession.

Appeal from judgment in favor of plaintiff recovered on trial before the court and jury.

Action to recover possession of certain premises. Plaintiff was appointed receiver in supplementary proceedings against one R. H. Berdell in the fall of 1876 on a

judgment recovered Oct. 2, 1876. It appeared that said R. H. Berdell brought action against one P. and defendant to redeem the premises in question from a deed to said P., which was claimed to be in fact a mortgage. In said action defendant alleged herself to be the owner by virtue of a conveyance executed by P. with the consent of the judgment debtor, and that she thereby became the absolute owner of the property. A notice of pendency of the action was filed with the complaint Nov. 12, 1875. The action was tried in 1883, and judgment was rendered in favor of defendant, declaring that she became the absolute owner of this and other property by reason of the deed executed and delivered to her. This judgment was interposed on the trial of this action as defenses in bar of plaintiff's right to recover.

Charles E. Rushmore for *applt.*

Philip L. Wilson, for *respt.*

Held, That the judgment was a bar to this action. That it was only from the time of his appointment that plaintiff was vested with the real property of the judgment debtor. When the title was vested in him it was subject to the action then pending concerning it in favor of the judgment debtor against P. and this defendant.

The judgment creditor became an incumbrancer upon the property on Oct. 2, 1876, when his judgment was recovered and a transcript of it was filed and docketed, and he, by the language of § 132, Code Civ. Pro., was as much bound by the action of Berdell v.

P. and Berdell as though he had in fact been made a party to the suit. When the receiver was appointed he took no more than the right and title of the judgment debtor to the real estate in controversy. And as that had previously been subordinated to the preceding action the receiver acquired it subject to the same incumbrance. Beyond that, the order appointing him when it was filed operated as a conveyance or transfer of the real property of the judgment debtor to the receiver. It was in fact a conveyance by operation of law and subjected the receiver to the proceedings in the pending action as much as though he had taken a deed from the judgment debtor Berdell in form conveying the title to the property. It was in substance a subsequently executed conveyance and within this section of the Code, as well as §§ 1670-71, Code Civ. Pro., afterward taking effect. He was bound by all the proceedings taken in the action of Berdell the same as though he had been a party to the suit. He came in under him and subjected himself to the determination afterward made in the action. He permitted the proceeding to go forward in the name of Berdell without in fact taking charge and control of it himself, as he was authorized to do. The judgment which was recovered in that action adjudged Berdell, the judgment debtor, not to be the owner of the property in controversy, but that the defendant in this action has become vested with the title to it and was at the time

of the recovery of the judgment, June 18, 1883, the owner in fee of the land, and no change in her title appears afterward to have taken place. This judgment, with the proof of the filing of the complaint and notice of pendency of the action, should have been held conclusive on the trial against the action of the receiver. He should not have been permitted as he was to recover a judgment for the possession of the property or for its rents and profits.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Brady, J.*, concur.

FORGERY. EVIDENCE.

N. Y. COURT OF APPEALS.

The People, *respts.*, v. Jones, *applt.*

Decided Oct. 4, 1887.

On a trial for forgery in procuring the discount of a note knowing the names of maker and indorser were those of fictitious persons, but representing them to be those of living persons and stating their places of residence, it is competent for a witness who has made search for such persons about the locality of their supposed residences to tell the means he took to find them and the results.

Although evidence which is improper has been received, yet it will not afford ground for an exception if it was not responsive to the questions put; in such case the party affected thereby should move to strike it out.

Affirming S. C., 25 W. Dig., 541,

Defendant was indicted for forgery in the second degree in having signed and indorsed a note with the names of fictitious per-

sons and procuring the note to be discounted as a genuine note. One H. swore that defendant told him before he indorsed the note, in answer to questions put by him, that the maker and indorsers were respectable farmers, and lived in certain localities which he specified. The witness was then allowed to tell what means he took to find the maker and indorser and the results, and also that he had looked over the assessment rolls of the towns where they were reputed to reside and found no such names.

Tracey C. Becker, for applt.

George T. Quinby, for resp't.

Held, No error.

The court stated that it would not allow any conversation between the witness and anybody he talked with, but he might state the fact that he had a talk and could get no information. In giving an account of his efforts the witness stated one or two of the responses that were made to him by parties inquired of.

Held, That these answers were not responsive to the questions asked, and although the evidence was improper it did not afford ground for an exception as the testimony was not called for; that if defendant's counsel desired to have these answers stricken from the record he should have made a motion to strike them out.

Defendant's counsel upon cross-examination of the cashier of the bank where the notes were discounted asked him questions as to the dealings between defendant and H., the indorser, and as to

how much of the various notes indorsed by H. for defendant had been paid by defendant or H. H. afterward as a witness for the prosecution was asked how much money he had to pay for defendant. This was objected to and admitted under exception.

Held, No error, as defendant's counsel had gone into the subject on the cross-examination of the cashier.

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Peckham, J.* All concur.

WILLS. EXECUTORS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

In re settlement accounts of Robert Willets et al., trustees.

Decided May 13, 1887.

Testator gave certain annuities and directed that on the death of the annuitants the principal should be divided between his grandchildren. He also gave the residue to his executors to dispose of and invest the proceeds and use the income for certain grandchildren named and on the death of each to pay the principal to the issue of the one so dying. By a codicil he revoked the provision made for respondent and her issue "in the residuary clause." *Held*, That this did not apply to the division of the annuity fund.

Where there are several distinct trusts it is proper for the trustee to keep a separate account with each trust.

Appeal from decree of surrogate settling the accounts of the trustees of Samuel Willets, deceased.

By his will testator bequeathed certain annuities, amounting to

\$10,000, and directed his executors to set apart and invest a fund sufficient to produce the same, which on the decease of each annuitant was to be divided among his grandchildren who should be living *per capita* and not *per stirpes*, retaining sufficient to produce the remaining annuities. By a later clause he bequeathed the residue of his estate to his executors in trust to sell the same and divide the proceeds into as many shares as there should be grandchildren living and invest the same, and to apply the income of each share to the use of certain grandchildren named and on the death of each to pay over the principal and accumulations to his or her lawful heirs, or in default thereof to the survivors.

By a codicil testator provided that as he had made sufficient provision for his granddaughter, the respondent, and her issue in other portions of his will he revoked all provisions and bequests in her favor and given to her and her issue in the residuary clause thereof and directed his executors to dispose of the same exclusive of said respondent.

It is claimed that the surrogate erred in finding that respondent was entitled to share in the annuity fund because of the codicil.

G. F. Foster, for applt.

Wilson M. Powell, for trustees.

C. A. H. Bartlett, for resp.

Held, No error. The language of the codicil seems clearly to intimate that but one residuary clause is referred to and that is that residuary clause in which

provisions and bequests in favor of respondent and her issue had been made. The only provision in any residuary clause for respondent and her issue is that part of the will whereby he directs his executors to sell and dispose of his estate and to convert it into cash and divide it into as many shares as there should be of his grandchildren. That clause also provides that on the death of respondent the executors shall pay over the principal and accumulations, if any, of the share allotted to respondent to her lawful issue, and this clause is evidently the one referred to in the codicil because in the clause relating to the annuities there is no provision whatever for the sharing by issue in the provisions therein made for his grandchildren. The devise is to a class and to such of the class as should be living at particular times; death necessarily excluding from participation either directly or representatively. The language of the codicil is not applicable in any way to this distribution of the annuity fund, and testator evidently did not intend to deprive his grandchild, respondent, of this provision which he had made in his will for her benefit.

The trustees kept separate accounts with each of these trusts.

Held, Proper. Each trust was separate and distinct, and each especially necessary after the division which the executors were required to make immediately after the reduction of the estate into cash and the allotment of the vari-

ous shares that separate accounts should be kept of each by the executors in order that there should be no confusion arising in the management of these separate and distinct shares.

Also held, That as the executors have terminated their duties as such, and the fund is held and managed by them as trustees that they were entitled to their full commissions as executors, and also their commissions as trustees. 95 N. Y., 263.

There seems to have been no error in the method in which the charge for taxes and salary of clerk was made. The taxes are a charge against the whole estate, and the services rendered by the clerk were rendered for the whole estate, and an apportionment of those charges were proper. They could not be saddled on any one particular part of the estate.

Decree affirmed, with costs.

Opinion by *Van Brunt, P.J.*; *Brady and Daniels, JJ.*, concur.

EMINENT DOMAIN. TITLE.

N. Y. COURT OF APPEALS.

The City of Brooklyn, respt., v. Copeland, applt.

Decided Oct. 4, 1887.

Under Chap. 340, Laws of 1861, the city of Brooklyn acquired a fee in the lands taken thereunder impressed with a trust to hold them for park purposes of which it could be relieved by the legislature.

After such relief a contract to sell the land and give a full covenant deed except as to liens and debts imposed by legislative action is one within the power of the city to make.

Where in an action to compel the purchaser to complete, the complaint alleges own-

ership in fee under the act of 1861, and the answer admitted the allegations and simply denied that the statute was competent to vest the city with the ownership in fee, *Held*, That the constitutional question affecting the validity of the act could not be questioned in this court.

This was an action to compel the specific performance of a contract for the purchase of land. The land in controversy became the property of plaintiff under Chap. 340, Laws of 1861, providing for a public park in the city of Brooklyn. The act provides that the land taken thereunder shall be held by the city in fee. The complaint alleged that plaintiff under the provisions of said act became and still is the owner in fee and possessed of the property in question, and that by Chap. 373, Laws of 1870, as amended by Chap. 795, Laws of 1873, a sale thereof was made to the defendant, who entered into a contract to purchase, but has refused to take title or pay the purchase money. The answer admitted each and every allegation of the complaint except it denied that the statutes therein mentioned were competent to vest in the city the ownership in fee of said premises.

H. C. M. Ingraham, for applt.

Almet F. Jenks, for respt.

Held, That as the complaint alleged an ownership in fee under the provisions of the act of 1861, it was equivalent to an allegation of a compliance with the terms of that act, and the same as an allegation that the commissioners' report was confirmed and payment made to the owners of lands, or their assent obtained by deeds du-

ly executed, as required; that the answer simply raised the question as to the *quantum* of the estate obtained by the city, and the constitutional question affecting the validity of the act could not be questioned here.

Upon the trial plaintiff's counsel asked if it was admitted by the other side that the steps required for the taking of lands for park purposes had been taken. Defendant's counsel said it was, but it was not admitted that any awards for the lands were accepted or received by the owners under such circumstances as to operate as a voluntary grant or to estop defendants from denying the sufficiency of the acts to vest title in fee to the plaintiff.

Held, That this statement does not detract from the admission already of record in the answer.

The city advertised to sell the land and give a full covenant and warranty deed except as to liens and debt imposed by legislative action, which the city assumed and agreed to discharge.

Held, That this was such a contract that the city could make.

Brooklyn Park Comrs. v. Armstrong, 45 N. Y., 234, distinguished.

Under the act of 1861, Chap. 340, the city acquired a fee in the lands impressed with a trust to hold them for park purposes, of which the city could be relieved by the legislature.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Peckham, J.* All concur.

NEGLIGENCE. EVIDENCE.

N. Y. COURT OF APPEALS.

Sherman, *respt.*, v. The D., L. & W. RR. Co., *applt.*

Decided Oct. 4, 1887.

In an action for injuries caused by falling over a board in the aisle of one of defendant's cars the brakeman on cross-examination denied having stated to plaintiff that he had forgotten to move it back to its place and that it was his fault. This was taken under objection to the question. Plaintiff on being recalled was allowed to contradict the brakeman and give the conversation including the admission of fault. *Held*, Error; that it was no part of the *res gestæ*; that the evidence came in under the former objection and it was unnecessary to repeat the objection or move to strike out the evidence.

This action was brought to recover damages sustained by the plaintiff through the negligence of defendant's servants. It appeared that plaintiff was a passenger on one of defendant's roads, and that on hearing a whistle which he supposed was intended for his station he got up from his seat and walked to the other end of the car to get some of his baggage, and as he was returning to his seat he tripped and fell over a board which a brakeman had placed across the aisle from under one seat to the one immediately opposite. Plaintiff testified that the board was not there when he passed down the aisle. Defendant's brakeman was called as a witness and swore that he was standing or just preparing to stand on the board when plaintiff came up and asked him to let him pass, which he did, and in doing so cau-

tioned him to be careful about or look out for the board. On cross-examination the witness was asked if he did not state to plaintiff that he had forgotten to move or slide back to its place the board on which he had stood; that it was his fault; that he was careless. This was objected to, the objection overruled, and the defendant's counsel excepted. The witness denied ever having any conversation with plaintiff after the accident. The plaintiff was subsequently recalled and asked by his counsel if he had any conversation with the brakeman in relation to the accident on the day it occurred, and he answered that he had, and under objection and exception by defendant's counsel stated that the brakeman asked him if he was much hurt, and he answered that he was badly hurt and suffering great pain. The court then asked him to repeat the conversation, which he did, and added, what he had not stated in answer to his counsel, that the brakeman said "it is my fault the board being left there."

Hamilton Odell, for applt.

L. B. Treadwell, for respt.

Held, Error; that the evidence was no part of the *res gestæ*, but was calling simply for a narrative of the cause of a past occurrence; that the evidence being in its nature inadmissible, the plaintiff could not obtain the benefit of it by cross-examining the brakeman in regard to it, and upon his denying it, seek to prove it by another witness under the guise of contradicting the brakeman; that there was

nothing in the evidence of the alleged conversation sworn to by plaintiff which legitimately tended to impeach or contradict the brakeman's evidence on his direct examination.

Also held, That the court having already ruled that the conversation was proper where the witness made an additional statement, it came in under the objection and exception already taken, and it was unnecessary to repeat the objection or to move to strike out the evidence.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed, and new trial ordered.

Opinion by *Peckham, J.* All concur.

DIVORCE. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Miriam D. Paul, *respt.*, v. Oerin I. Paul, *applt.*

Decided Oct., 1887.

The referee to whom it was referred to hear, try, and determine the issues in an action for divorce for adultery, in which the answer alleged as a counterclaim that plaintiff had been guilty of the same offense, reported that defendant had committed adultery, but his report was silent as to the recriminatory charges. *Held*, That the omission to find upon the issues respecting plaintiff's adultery is fatal to a judgment of divorce in her favor, notwithstanding it does not appear that defendant requested a finding upon his counterclaim, or excepted to the report on account of the alleged defect, or asked to have the report sent back for further findings, and although the evidence supported the finding of defendant's guilt.

Appeal from judgment at Special

Term on referee's report under an order appointing him to hear, try, and determine the issues in an action for divorce on the ground of adultery.

The complaint charged defendant with acts of adultery and asked for a divorce. The answer denied the charges, and alleged as a counterclaim that plaintiff had been guilty of adultery, and demanded judgment of divorce on that account. The referee reported that defendant had committed adultery, but his report was silent as to the charges made against plaintiff.

F. Brundage, for applt.

John R. Hazil, for respnt.

Held, That the omission to find upon the issues respecting plaintiff's adultery is fatal to a judgment for divorce in her favor. 9 Abb., N. S., 291; 26 W. Dig. 122; Code, § 1758, subd. 4.

Respondent's counsel contends that the rule should not be applied here, because it does not appear that defendant requested a finding upon his counterclaim, or excepted to the report on account of the alleged defect, or asked to have the report sent back for further findings. In respect to such objections and action for divorce on the ground of adultery is an exception to the ordinary rule. The most that respondent can claim is that by reason of the omissions referred to appellant waived the defect, but plaintiff is not entitled to a divorce by reason of the waiver or consent of defendant. A trial and determination of the counterclaim is needed

for the information of the court before judgment will be pronounced.

The finding as to defendant's guilt is supported by the evidence. Aside from ample evidence of opportunity during the four years' residence of the alleged paramour in the defendant's house as a domestic, there is much testimony tending to show repeated acts of familiarity, not explained by the fact that they were members of the same household, of such a character as to indicate a mutual inclination to know each other carnally. Furthermore, the witness N. testified that she saw defendant and his paramour in bed together, before the marriage of defendant with plaintiff. The testimony was admissible to characterize the subsequent conduct of the parties, for it was evidence which if believed authorized the finding of an adulterous intercourse on the occasion to which it referred, and in view of the evidence of subsequent opportunity and inclination, it justified the inference that the unlawful connection was continued. 4 Paige, 432.

The entire testimony, which we do not state in detail, supports the finding. 101 N. Y., 659.

On account of the referee's omission to find upon the recriminatory charges, the judgment must be reversed and the case sent back to the same referee to find upon the issues respecting the alleged adultery of plaintiff, the findings as to defendant's guilt to stand. And as the finding so far as they deal with the merits are not dis-

turbed, and the only defect in the judgment is one which might have been remedied if defendant had called attention to it before bringing his appeal, the costs of appeal should be charged upon him.

So ordered.

Opinion by *Smith, P.J.*; *Haight* and *Bradley, JJ.*, concur.

APPEAL. PRACTICE.

N. Y. COURT OF APPEALS.

Prosser, respt., v. *The First Nat. Bk. of Buffalo et al.*, *appls.*

Decided Oct. 4, 1887.

Where there are no errors pointed out by the exceptions and the order of General Term does not state that the reversal was on the facts, such order of reversal cannot be upheld.

This action was brought to recover damages on the purchase of certain stock by plaintiff from the defendant corporation, which purchase the complaint alleged was induced by certain false and fraudulent representations made by the president of the bank on its behalf as to its financial condition. Upon the trial the court found that the purchase was not made of the bank, but of its president, and that the bank did not make to plaintiff through its president or otherwise the statements and representations touching its condition, or in respect to the stock alleged in the complaint, and it was not chargeable with any such representations made by its president. The complaint was dismissed, and up-

on appeal to the General Term judgment of the court below was reversed and a new trial ordered. The order of reversal did not specify that the reversal was upon questions of fact.

The findings of the trial court were sustained by the evidence, and there were no errors pointed out by the exceptions to the rulings.

John G. Milburn, for *appls.*

James F. Gluck, for *respt.*

Held, That as no error was pointed out by the exceptions and as the order of the General Term did not state that the reversal was upon the facts, the order of reversal cannot be upheld.

Order of General Term, reversing judgment dismissing complaint, reversed, and judgment of trial court affirmed.

Opinion by *Earl, J.* All concur, except *Ruger, Ch. J.*, not voting.

FORECLOSURE. DEFENSE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Nelson K. Hopkins, respt., v. *Mary A. Ensign et al.*, *appls.*

Decided Oct., 1887.

Defendants in foreclosure contend that the consideration for the bond and mortgage was an illegal one, to wit, an agreement to prevent competition at a public sale. *Held*, as the alleged illegality was not shown by plaintiff's proof or pleaded by defendants, *quere* whether it is available as a defense. Under the circumstances of this case, *Held*, That the alleged defense was not proved.

Appeal from judgment on referee's report.

Action of foreclosure. The defenses set up in the answer are that the bond and mortgage were executed under duress and are without consideration. The referee found against each of those defenses on sufficient evidence. Defendants contend that the evidence shows that the consideration for the bond and mortgage was an illegal one, to wit, an agreement to prevent competition at a public sale. The intent of the arrangement or contract, in pursuance of which White refrained from bidding, was not to prevent or suppress competition. Its object was to enable the defendant, Mrs. Ensign (who, with her daughter, owned the equity of redemption under the will of Charles Ensign, deceased), to buy in the mortgaged property at less than its value, and to secure to White the payment of his claim for professional services rendered for Holt, the surviving partner of himself and Ensign. Holt was insolvent and there was nothing out of which White could collect his claim except the property left by Ensign. He might have made the amount of it by bidding at the sale, and he refrained from bidding in consequence of Mrs. Ensign's agreement to secure his claim if she became the purchaser.

George M. Osgoodby, for applt. Mary A. Ensign.

L. N. Bangs, for applt. Mary Ensign.

Truman C. White, for respt.

Held, As the alleged illegality is not shown by plaintiff's proofs nor pleaded by defendants, it is ques-

tionable whether it is available as a defense. Code of Procedure, § 149; Code of Civil Procedure, § 500; 16 N. Y., 297; 44 Barb., 87; 12 N. Y., 32; 73 id., 480; 1 Hun, 92; 13 Abb. N. C., 384; id., 393; Pomeroy's Remedies, § 708. But it is not necessary to decide that question, as the defense was not proved. The arrangement was not illegal, although it had the effect, incidentally, to prevent competition between White and Mrs. Ensign. 3 Metc., 384; 66 N. Y., 288; 83 id., 14; 34 Hun, 115.

Judgment affirmed, with costs.

Opinion by *Smith, P.J.*; *Barker, Bradley and Lewis, JJ.*, concur.

CHARTER PARTY. PARTIES. BAR.

N. Y. COURT OF APPEALS.

Woodhouse et al., respts., v. Duncan et al., applts.

Decided Oct. 4, 1887.

A charter-party was executed by defendants with their firm name but in fact for themselves and the other charterers, which fact was not known to plaintiffs. The charter-party was not under seal. *Held*, That plaintiffs could prove in an action on the charter-party that defendants executed it as representing all the charterers; that they could be treated as agents; and that such other persons could be treated as dormant partners and were not necessary parties defendant.

An adjudication in a former suit in admiralty against plaintiffs brought by defendants in which it was adjudged that plaintiffs had performed all the covenants in the charter-party is binding on the parties thereto and those whom they represented and who were in privity with them.

This action was brought to recover an amount claimed to be due under a charter party. It appeared that the charter party was signed only by the plaintiffs with their firm name and by the defendants D. & P. with their firm name, but that D. & P. executed it on behalf of themselves and the other charterers. The charter-party was not under seal. Upon the trial plaintiffs proved that it was executed by D. & P. not only for themselves, but as representing all those who chartered the steamship.

R. D. Benedict, for applts.

William Allen Butler, for respts.

Held, No error; that D. & P. may be treated as agents executing the charter-party, for themselves and all others interested as principals with them. 64 N. Y., 357; 76 id., 32; 78 id., 582.

Defendants claimed that plaintiffs wholly failed to keep and perform the charter on their part, and failed to keep the vessel tight and staunch as they agreed in the charter, and that thereby damages resulted to an amount exceeding the charter money. Plaintiffs proved that D. & P. had soon after the return of the vessel brought a suit in admiralty against the steamship and her owners to recover the damages sustained; that the libel in that suit was dismissed on the ground that the owners of the vessel had performed all their covenants and undertakings contained in the charter-party.

Held, That the adjudication in that suit was binding upon the parties thereto and those whom they

represented and who were in privity with them.

It was claimed that plaintiffs should have included in this action certain persons as parties defendants, whose names are mentioned in the answer, as interested in the adventure. It was proved that all these persons were interested in the adventure, but that at the time of making the charter-party plaintiffs had no knowledge that persons other than D. & P. were interested as partners, or that they were parties to the contract. It was not proved that these other persons were interested as joint partners with D. & P.

Held, That as at the time of making the contract the persons referred to were not known to the plaintiffs to be joint contractors with D. & P., and they supposed they were contracting with D. & P. only, the other persons could be treated as dormant partners, and it was not necessary to make them parties defendant. 29 Barb., 549; 66 id., 73; 7 Daly, 498; 30 N. Y., 374; 47 id., 648; 52 id., 270; 1 Abb. Ct. App. Dec., 438; 12 M. & W., 405; 1 B. & A., 491; Col. on Part., § 719.

It was not sufficient that plaintiffs may have known that the persons named may have had some sort of interest in the adventure; they must have known they were members of a firm with defendants or joint contractors with them. 106 N. Y., 206.

Judgment of General Term, affirming judgment for plaintiffs on verdict, affirmed.

Opinion by *Earl, J.* All concur.

FIRE INSURANCE.

N. Y. COURT OF APPEALS.

The National Filtering Oil Co.,
respt., v. The Citizens' Ins. Co. of
 Missouri, *applt.*

Decided Oct. 4, 1887.

A policy of insurance was issued by defendant to plaintiff on the oil works of E. & Co. to protect royalties payable by that firm to plaintiff for certain patents, and which were guaranteed to amount to \$250 a month. The policy provided that if the premises were damaged by fire so as to cause a diminution of the royalties defendant would make good such diminution. E. & Co. had an exclusive license to use the patents. *Held*, That the policy insured the whole of the royalties, and not merely the guaranteed portion, and was not void as a wager contract.

Such an interest in property connected with its safety and situation as will cause the assured to sustain a direct loss from its destruction is an insurable interest, although he has no interest, legal or equitable, in the premises themselves.

Affirming S. C., 20 W. Dig., 880.

This was an action upon a policy of fire insurance issued by defendant on the oil reducing and filtering works of E. & Co. and for the protection of specified royalties payable by that firm to plaintiff as compensation for an exclusive license to use in its business a certain patent controlled by plaintiff. The policy recited that E. & Co., "by virtue of an agreement with the assured, are bound to pay them royalties for the privilege of using their patents, which royalties are guaranteed to amount to \$250 per month." It was provided that if the premises were "damaged by fire so as to cause a diminution of said royalties this company will make good to the insured the

amount of such diminution during the restoration of such premises to their producing capacity immediately preceding said fire."

G. A. Clement, for *applt.*

F. R. Coudert and *Paul Fuller*,
 for *respt.*

Held, That the policy insured the royalties payable under the contract, not merely the guaranteed proportion, but the whole of the royalties stipulated and was not void as a wager contract; that although beyond the guaranteed minimum the royalties were contingent and dependent on the condition of the market, and even possibly on the will and choice of E. & Co. in the seasonable control of their business, but as E. & Co. had an exclusive license and their business was lessened and restricted because of fire, no other license could be granted and the loss of the diminished royalties would fall upon plaintiff, and that risk being one necessarily connected with the premises, it had a right to insure it.

An interest, legal or equitable, in property destroyed by fire is not necessary to support an insurance upon it; it is enough if the assured is so situated as to be liable to loss if it be destroyed by the peril insured against. Such an interest in property connected with its safety and situation as will cause the insured to sustain a direct loss from its destruction is an insurable interest.

If there be a right in or against property which some court will enforce against it, a right so closely connected with it, and so much dependent for value upon the con-

tinued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest. 27 N. Y., 163; 43 id., 389; 62 id., 47.

The amount of royalties paid for two months immediately preceding the fire was proved, also the amount during the time the works were being restored.

Held, No error.

The contract of E. & Co. with the plaintiff was introduced in evidence.

Held, No error.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Finch, J.* All concur.

BROOKLYN BRIDGE. NEGLIGENCE.

N. Y. COURT OF APPEALS.

Walsh, *respt.*, v. The Mayor, etc., of N. Y., *impl'd.*, *applt.*

Decided Oct. 18, 1887.

The trustees of the Brooklyn bridge represent the cities of New York and Brooklyn as their agents, and the persons employed by them are agents and servants of the two cities, for whose negligence those cities are liable.

Affirming S. C., 24 W. Dig., 400.

This action was brought to recover damages for injuries received by plaintiff through the alleged negligence of a laborer employed in the construction of the Brooklyn Bridge. The mayor and aldermen of New York and Brooklyn were made parties defendant. The com-

plaint alleged the incorporation of said two cities, and that at the time plaintiff was injured defendants were engaged in constructing the New York and Brooklyn Bridge through their agents and officers who were known as trustees thereof; that said trustees employed a laborer, who while acting within the scope of his employment for said defendants by his negligence and carelessness caused the plaintiff's injuries. It was also alleged that before the action was commenced plaintiff's claim, duly verified, was presented to the comptrollers of both cities. The complaint was demurred to as not stating facts sufficient to constitute cause of action. The demurrer was overruled and an interlocutory judgment ordered for plaintiff, which was affirmed by the General Term.

D. J. Dean, for *applt.*

Charles J. Patterson, for *respt.*

Held, That the demurrer was properly overruled; that in every sense the bridge was constructed and is managed for the two cities, and the trustees appointed by the city officials represent the two cities as their agents, and the persons employed by them are agents and servants of the two cities, for whose careless and negligent acts they are liable. 96 N. Y., 264, 427; 76 id., 475; Laws of 1867, Chap. 399; Laws of 1874, Chap. 601; Laws of 1875, Chap. 300.

Judgment and order of General Term, affirming interlocutory judgment of Special Term, affirmed.

Opinion by *Earl, J.* All concur.

LIFE TENANT. WASTE.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

Mary B. Bouton et al., *appls.*,
v. Carrie Thomas, as exrx., et al.,
respts.

Decided Oct., 1888.

Testator by his will gave the residue of his estate to his heirs equally. By a subsequent clause in the will he gave his whole estate to his executors in trust to pay his debts and specific legacies with power of sale. Among the specific devises was one of a life estate in certain real estate. *Held*, That testator's heirs might sue for waste committed by the life tenant in cutting growing trees.

Appeal from judgment of nonsuit ordered at Circuit.

Plaintiffs, claiming as remaindermen or reversioners under the will of L., seek to recover for waste in cutting down growing trees, alleged to have been committed or directed by the life tenant. The will, after directing the payment of testator's debts and specifying certain devises and bequests, gave the residue of the estate, real and personal, to "my heirs to be equally divided between them, share and share alike, including my wife." By a subsequent clause it gave "all my real and personal estate of what nature or kind soever to 'A., B. and C., the executors of this my last will and testament, hereinafter nominated and appointed, in trust for the payment of my debts and the legacies above specified, with power to sell and dispose of the same at public or private sale, at such time or times, and upon such terms and in such man-

ner as to them shall seem meet." Among the specific devises was one of a life estate in the real estate in question to said A., who was one of the original defendants in this action. A. having died, his executrix was substituted in his place. At the trial, plaintiffs put the will in evidence, and when they rested defendants moved for nonsuit on the ground that plaintiffs "have shown neither title nor possession to the premises in question, and for that reason they cannot maintain this action." The court granted the motion on the ground that the title was in the trustees and not in the heirs.

John L. Parker, for *appls.*

H. Greenfield, for *respts.*

Held. Error. The trust was to pay debts and legacies. It was good as a power in trust to sell and apply the proceeds to that purpose. 1 R. S., 728, § 55, subd., 1, 2; but the trustees were not authorized to receive the rents and profits, nor were they entitled to the possession, and therefore no estate vested in them. 1 R. S., 729, § 56. Until the execution of the power, the fee was in the heirs subject to the life estate of A. 1 R. S., 729, §§ 56, 59; 1 Den., 53; 2 Hill, 569; 8 Paige, 295; 43 N. Y., 303; 105 id., 185.

The Revised Statutes gave to a person seized of an estate in remainder or reversion the right to maintain an action of waste or trespass, for any injury done to the inheritance, notwithstanding any intervening estate for life or years. 1 R. S., 750, § 8. That right is continued by the Code of

Civil Procedure, §§ 1651, 1652, 1655.

Judgment reversed and new trial ordered.

Opinion by *Smith, P.J.*; *Barker, Haight* and *Bradley, JJ.*, concur.

NEGLIGENCE.

N. Y. COURT OF APPEALS.

Cahill, respt., v. Hilton et al., appls.

Decided Oct. 4, 1887.

Plaintiff, who was in defendant's employ, was directed to disconnect a belt and hang it up for repairs, a feat which he had often done before. He found the ladder in position, looked to see if it was all right, ascended and endeavored to seize the belt, which was revolving rapidly, became unconscious, and was found on the floor with his arm torn out and the ladder broken. No one saw the accident. *Held*, That plaintiff was not entitled to recover, as it did not appear that the injury resulted from any defect in the ladder, and he was liable for having elected to do the work in a manner he knew to be hazardous rather than accept precautions which would make it entirely safe.

Reversing S. C., 21 W. Dig., 541.

This action was brought to recover damages for injuries received by plaintiff through the alleged negligence of defendants. It appeared that defendants owned a carpet factory in which plaintiff had been employed for four years as a general helper in the gig-room, and plaintiff was injured by having his arm torn off while attempting to shift, while the machinery was in motion, a belt upon a shaft for the purpose of relacing it, plaintiff using a ladder which was about twelve feet

long, and had been provided for no special purpose, but had been used for some fifteen years about the factory for the ordinary uses of such a ladder, and which plaintiff claimed was defective and consequently caused the injury. The superintendent and foreman of the factory had been expressly directed by defendants not to allow the machinery to be repaired while in motion. There was no necessity for relacing the belt while the machinery was in motion, and no proof that the ladder was furnished for the purpose to which plaintiff put it, or that the defendants were aware of the manner in which he intended to use it. Plaintiff admitted that he had frequently performed the same service before and always in the same manner and with the same ladder, and that he knew it to be a hazardous undertaking. There was no direct evidence of the manner in which the accident occurred.

Frank B. Lown, for appls.

Austen G. Fox, for respt.

Held, That plaintiff was not entitled to recover; that it does not appear from the evidence that the injury resulted from any defect in the ladder, and plaintiff was liable for having elected to do the work in a manner he knew to be hazardous, rather than adopt precautions which would have made it entirely safe; that plaintiff in order to recover was bound to establish personal negligence on the part of the defendants, or, what is equivalent thereto, and they are entitled to the benefit of the presumption that they had

performed their duty until the contrary appears. Wood on Master and Servant, §§ 345, 346.

Also held, That plaintiff was required to show affirmatively his own freedom from negligence; that proof of this fact usually presents a question for the jury, and is often to be inferred from the nature of the accident and the circumstances of the case; but this conclusion cannot legally be reached unless such circumstances are proved as legitimately and reasonably lead to such result. Unless the court can see that such facts are proved as fairly tend to support a presumption of freedom from negligence, the question becomes one of law.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed.

Opinion by *Ruger, Ch. J.* All concur.

PERJURY.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The People, *appls.*, v. John P. Allen, *respt.*

Decided June, 1887.

Perjury cannot be assigned upon an affidavit attached to an account for services against the city of Buffalo, it not having been used by the claimant, or delivered by him to any person to be used, in procuring an audit of the account, by presenting it to the common council.

Appeal from judgment of the Superior Court of the city of Buffalo sustaining demurrer to indictment charging defendant with perjury in falsely swearing to a bill

held by him against the city of Buffalo for services rendered by him in cleaning the vaults of one of the public school houses of the city under the employment of the commissioner of public buildings. The bill as made out and verified by defendant charged the city with the removal of 37 yards and 9 feet of night soil at \$2.25 per yard, amounting to \$84, and the indictment charges that only about 6 yards were removed, worth \$13.50, and in that particular consisted the alleged falsity of the affidavit. The city charter provides that all claims against the city shall be audited by the common council, and it requires that before any account for labor or services shall be audited it shall be made out in detail and verified by the affidavit of the claimant to the effect that the work charged for had been done, and that the charges are reasonable and just, etc. Corrupt false swearing to any material fact in such affidavit is declared to be perjury. It is also provided that before any such bill shall be presented to the common council for audit it must be certified by the head of the department ordering the same, and in case of repairs on the public schools, by the principal of the school where the same was done. The indictment charges that defendant presented the bill so made out and verified by him to the head of the department and the principal of the school for the purpose of obtaining their certificates, and that he obtained the certificate of the former annexed to the bill, but it does not aver

that he presented the bill to the common council for any purpose, or that he delivered it to any person to be so presented. For aught that is alleged, he made no further use of said verified bill after obtaining such certificate and presenting it to the principal of the school, and did not part with its possession. For the purposes of this case it is to be assumed that the bill was not required by law to be verified until it was presented to the common council for its action; that neither the superintendent nor the principal of the school had authority to receive the bill for the common council, nor did they assume to do so; and that the making of the affidavit by the claimant, before presenting the bill to them for certification, was a voluntary act on his part, which neither of them could require.

George T. Quinby, Dist. Atty., for applt.

Tracy Becker, for respt.

Held, Perjury cannot be assigned upon the affidavit, it not having been used by defendant, or delivered by him to any person to be used, in procuring an audit of the bill, by presenting it to the common council. 4 Hun, 323.

The affidavit was not one to which § 96 of the Penal Code relates; nor was it complete under § 100.

The People v. Bowe, 34 Hun, 528, distinguished.

Judgment affirmed, and case remitted to Superior Court.

Opinion by *Smith, P.J.*; *Bradley, J.*, concurs; *Haight, J.*, dissents.

MUNICIPAL CORPORATIONS. COSTS.

N. Y. COURT OF APPEALS.

Hunt, applt., v. The City of Oswego, respt.

Decided Oct. 18, 1887.

Section 3245 of the Code does not apply to an action to recover damages for injuries caused by the negligence of the servants of a municipal corporation.

This action was brought to recover damages for injuries to plaintiff's garden from being flooded by the improper construction of defendant's sewers and gutters, and its failure and neglect to provide and maintain a proper outlet for the water thus accumulated. No petition or claim was presented by plaintiff to defendant's city treasurer. A verdict was rendered for plaintiff for \$150, and plaintiff's attorney entered judgment for that amount damages and \$177.88 costs. Defendant moved for a re-taxation of the costs and a disallowance thereof under § 3245 of the Code of Civil Procedure, which prohibits the allowance of costs to the plaintiff in an action against a municipal corporation in which the complaint demands a judgment for money only, unless the claim has, before the commencement of the action, been presented for payment to the chief fiscal officer of the corporation. This motion was denied, but on appeal the General Term reversed the order of the Special Term.

W. H. Kenyon, for applt.

E. B. Powell, for respt.

Held, That the motion was properly denied; that to entitle the

plaintiff to costs it was not necessary to present the claim as required by § 3245 of the Code; that said section does not apply to an action brought to recover damages for injuries caused by the negligence of the servants of a corporation. 106 N. Y., 667.

Order of General Term, reversing order of Special Term, reversed, and order of Special Term affirmed.

Opinion by *Ruger, Ch. J.* All concur.

RES ADJUDICATA.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Pierre Cauhape, applt., v. Parke, Davis & Co., respts.

Decided Oct. 26, 1887.

Before a finding in a former action can be invoked against a party as a prior adjudication it must appear that it constituted a decision or basis of a decision from which such party could have appealed.

Where in a former action between these parties the referee found that the contract in question was made, but that the court had no jurisdiction thereof, and therefore dismissed the case as to such contract, *Held*, That the existence of the contract was not *res adjudicata* so as to bind the defendant.

Appeal from judgment, entered on report of referee dismissing the complaint.

Action on an alleged contract by which defendant was to reassign a certain patent to plaintiff and pay certain royalties on a license to use the same to be given by plaintiff. The complaint alleged that the making of the contract was adjudicated in a former

action between these parties. The answer denied the making of the contract or that the issues in the former action were tried or that the court had jurisdiction to try the issue to this contract, and that as to this cause of action the referee dismissed the complaint for want of jurisdiction.

The only evidence to prove the existence of the contract offered on this trial was the judgment in the former action, from which it appeared that that action was brought on two separate contracts, one of which was the one involved in this action; that the referee therein found that the contract sued upon here was made, but also found that the court had no jurisdiction of the cause of action on the contract here in question, and rendered judgment solely on the other contract.

The referee in this case dismissed the complaint for a failure to prove the existence of the contract sued on.

Howard Y. Stillman, for applt.

William P. Chambers, for respts.

Held, No error; that the existence of this contract was not *res adjudicata* in the previous action in such a sense as to render the former finding of fact binding on defendants in this suit. It is true that plaintiff recovered a small judgment in the prior action, but that was founded not at all on this contract, but on another and different agreement of earlier date. So far as the contract here in question was concerned defendants were successful in the former suit.

Upon an appeal they could not have been heard to complain of the action of the court in respect to this contract, for the refusal to enforce it on the ground of want of jurisdiction was a decision in their own favor. So long as the referee in that case denied plaintiff any relief based on the contract his finding that it existed was wholly needless and immaterial. Before that finding could successfully be invoked against defendants as a prior adjudication we think it would have to appear that it constituted a decision, or the basis of a decision, from which defendants could have appealed.

Judgment affirmed, with costs.

Opinion by *Bartlett, J.*; *Van Brunt, P.J.*, and *Daniels, J.*, concur.

ASSESSMENTS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Ann E. De Montsaulnin, respt.,
v. *The Mayor, etc., of N. Y., applt.*

Decided Oct. 26, 1887.

The prohibition against actions to vacate assessments in the city of New York contained in Chap. 338, Laws of 1858, as amended by Chap. 302, Laws of 1874, applies only to assessments which are liens at the time the action is commenced, and an action will lie after payment of an assessment to declare the same invalid and to recover back the sum paid.

Appeal from judgment in favor of plaintiff.

Action to declare an assessment which had been paid invalid, and to recover back the sum paid. Appellants claim that the action could not be maintained; that no

action will lie to declare an assessment invalid, because of the provisions of Chap. 338, Laws of 1858, as amended by Chap. 302, Laws of 1874. Said statute reads as follows: "Hereafter no suit or action in the nature of a bill in equity or otherwise shall be commenced for the vacation of any assessment in said city, or to remove a cloud upon title, but owners of property shall hereafter be confined to their remedies in such cases to the proceedings under the act hereby amended."

G. L. Sterling, for applt.

David D. Acker, Jr., for respt.

Held, Untenable; that the question is not open to discussion in this court in view of the decision of the Court of Appeals in *Jex v. Mayor*, 103 N. Y., 536. In that case the court distinctly holds that the prohibition contained in the Act of 1858, as amended in 1874, applied only to those cases in which the assessment was at the time of the proceeding or action a lien on the real estate intended to be affected by it, and that when such assessment was no longer a lien because of payment that an action might be brought to declare the assessment invalid and to recover back the amount paid. It is true that in the case above cited the court held that the action might be maintained because of want of jurisdiction to levy the same, but the rule above stated was distinctly enunciated and must be followed by us.

Judgment affirmed, with costs.

Opinion by *Van Brunt, P.J.*; *Brady* and *Bartlett, JJ.*, concur.

DEED. EVIDENCE.

N. Y. COURT OF APPEALS

Case, *respt.*, v. Dexter et al.,
applt.

Decided Oct. 4, 1887.

A deed described the land conveyed as being Lot No. 3, lying southerly of Fish Lake and commonly called the Fish Lake lot, supposed to contain 67 acres. The Fish Lake lot contained 600 acres, all covered by the lake, except 67 acres lying south and 7 acres north of the lake. *Held*, That the deed did not cover the 7 acres.

Where there is any doubt on the proof as to the intention of the parties as to the subject of the grant it is error to reject oral evidence to explain it.

Affirming S. C., 21 W. Dig., 32.

This was an action of trespass. It appeared that when the alleged trespass was committed, the defendant D. owned the *locus in quo* under a deed which described the premises conveyed as "Known as being lot No. 3, in the original township of Lysander, lying southerly or south-easterly of Fish Lake in Granby aforesaid, and commonly called the Fish Lake lot, supposed to contained sixty-seven acres of land." Lot 3 contained 600 acres of land, all of which is covered by Fish Lake, except the sixty-seven acres lying south and about seven acres, which is the land in controversy, lying north of the lake.

S. M. Dada, for *appls.*

Giles S. Piper, for *respt.*

Held, That the seven acres on the north side of the lake were not included in defendant's deed; that that part of the description referring to the land intended to

be conveyed as "Lot 3" is mistaken or false.

Where there is obscurity or uncertainty in the description in a deed all the particulars in the descriptions are to be taken into account in arriving at the true meaning and intention. Where the description is ambiguous, or there is inconsistency, words, if necessary, may be supplied by intendment and particular clauses and provisions qualified, transferred or rejected in order to ascertain and give effect to the intention. (6 Hill 453, 455). The words or clauses to be rejected or qualified in case of uncertainty are frequently determined by giving effect to those parts or clauses of the description which are most certain, and to particulars in respect of which the parties would have been least likely to have made a mistake. For this reason monuments control courses and distances, and estimates of quantity are usually subordinated to both. 16 N. Y., 359. Upon the trial plaintiff offered to prove that the land commonly called the Fish Lake lot was known as the sixty-seven acres south of the lake. This was objected to and excluded.

Held, That if there was any doubt upon the proof as it stood of the intention of the parties, the court erred in rejecting the evidence.

Order of General Term, reversing judgment for defendants on verdict affirmed, and judgment absolute for plaintiff on stipulation.

Opinion by *Andrews, J.* All concur.

LIFE INSURANCE. INTER-
PLEADER. PRACTICE

N. Y., COURT OF APPEALS.

Clark, *respt.*, v. Mosher, admr.,
applt.

Decided Oct. 11, 1887.

In an action on a life insurance policy there were two claimants for the money and an order of interpleader was made and the company paid the money into court. *Held*, That the action was of an equitable nature and triable by the court, and that the court was not bound by the finding of the jury on specific questions submitted to them, but might disregard it and find the contrary.

Reversing S. C., 26 W. Dig., 60.

Plaintiff brought an action at law against the Phoenix Mutual Life Insurance Co. upon a policy issued by it on the life of her husband. The company admitting its liability on the policy set up that M., defendant's intestate, also claimed the amount of the policy and upon payment of the fund into court plaintiff was required to substitute M. as defendant, and the object of this action was to determine the conflicting claims of plaintiff and M. to the fund in court. Defendant claimed at the circuit that this was an equity case triable by the court and the trial judge submitted to them a single question of fact to be answered in the affirmative or negative. The jury found the question in the affirmative which was in plaintiff's favor. The trial judge disregarded this finding and found the fact in the negative, and judgment was entered pursuant to his findings.

N. C. Moak, for *applt.*E. Countryman, for *respt.*

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Held, No error; 95 N. Y., 255; that the action was of an equitable nature and triable by the court.

Order of General Term, modifying order of Special Term denying motion to set aside verdict, reversed, and order of Special Term, affirmed.

Opinion by *Rapallo, J.* All concur, except *Peckham, J.*, not sitting.

DAMAGES. EVIDENCE.

N. Y. COURT OF APPEALS.

Staal, *respt.*, v. The Grand St.
& Newtown RR. Co., *applt.*

Decided Oct. 11, 1887.

In an action for damages caused by negligence where loss of time is claimed as an item, only nominal damages therefor can be given where there is no proof of the value of the time lost or of facts on which an estimate of such value can be founded.

Where plaintiff's disability is permanent, but there is no proof of his condition in life, earning power, skill or capacity, it is error for the court to charge that he is entitled to compensation for the results that will flow in the future from this injury * * and for pecuniary loss on account of the injury caused by the diminution in his ability to earn a livelihood, and also to consider what expenditures he would incur to make him comfortable.

Reversing S. C., 22 W. Dig. 55.

This action was brought to recover damages for injuries sustained by plaintiff while alighting from one of defendant's cars in which he was a passenger. Only exceptions to the judge's charge are brought up on this appeal. Upon the question of damages he

charged that plaintiff was entitled to recover compensation for his pain and suffering, and, as the injury was to some extent permanent, compensation for the results which will flow in the future from it; that is for any suffering and inconvenience he will have in life resulting from this injury, and for pecuniary loss on account of the injury caused by the diminution in his ability to earn a livelihood. Defendant's counsel excepted to that part of the charge in which the jury were instructed that they could allow plaintiff his pecuniary losses resulting from his disabilities owing to the accident, and he requested the judge to charge that the jury might take into consideration the great age of the plaintiff as affecting future continuance of life. The judge so charged and said further that as there was no proof of loss shown by what plaintiff's income was up to the time of the injury, what was charged as to pecuniary losses was in connection with the future. Defendant's counsel excepted and requested the judge to charge that the jury could not "make further allowance to the plaintiff for expenses, treatment or care for the past or future." The judge replied: "I charge that for the past. For future expenses the jury have a right to consider the expenses of this injury if they find this renders the plaintiff to any extent helpless, and also to consider to what expenditures to make him comfortable he will have to go." Defendant's counsel excepted. It

appeared that immediately after the injury plaintiff was taken to a charity hospital where he remained three months, and then went to another where he remained several months, and from thence went to the County Alms House, where he remained until the trial, not having been subjected to any expenses. The plaintiff was a fresco painter and for some time before he was injured had been so employed. No special damages and no pecuniary losses, past or future, were alleged in the complaint. There was no proof as to plaintiff's circumstances in life except that before the injury his "general health was very good." There was no proof as to his age, habits, capacity, ability to work, skill, the wages he was able to earn or his chances of getting work, or that he had been able to earn a livelihood.

Albert G. McDonald, for applt.

A. Simis, Jr., for resp't.

Held, That the charge was erroneous; that in a case like the present where loss of time is claimed as an item of damages, if the plaintiff fails to prove the value of the time lost or facts on which an estimate of such value can be founded only nominal damages for that item can be given.

Before damages for future pecuniary loss can be awarded there should be proofs such as a party can always give of his circumstances and condition in life, his earning power, skill and capacity. 90 N. Y., 26.

Judgment of General Term, af-

firming judgment for plaintiff, reversed, and new trial granted.

Opinion by *Earl, J.* All concur, except *Ruger, Ch. J.*, and *Danforth, J.*, dissenting.

NEGLIGENCE. STEAMSHIP COMPANY.

N. Y. COURT OF APPEALS.

Laubheim, applt., v. *Die Koninklyk Nederlandisch Stoomboot Maatschappij, respt.*

Decided Oct. 18, 1887.

A steamship company, if bound to provide a surgeon for its ship, its duty to the passengers is to select a reasonably competent man for that office, and it is liable only for a neglect of that duty and not for the negligence of the surgeon employed. It is bound only to the exercise of reasonable care and diligence in performing such duty and its not compelled to select and employ the highest skill and longest experience.

This action was brought to recover damages for injuries resulting from the unskillful treatment received by her while in charge of defendant's surgeon, she being at the time a passenger on one of defendant's ships. It appeared that said surgeon had been in defendant's employ for three years and, so far as was shown, was reasonably competent for his duty. The complaint was dismissed.

A. Blumenstiel, for applt.

S. W. Rosendale, for respt.

Held, No error; that if by law or by choice the defendant was bound to provide a surgeon for its ships, its duty to the passengers was to select a reasonably competent man for that office, and it is liable

only for a neglect of that duty. 55 N. Y., 579; 120 Mass., 432; 18 Fed., 221. It is responsible solely for its own negligence and not for that of the surgeon employed. In performing such duty it is bound only to the exercise of reasonable care and diligence and is not compelled to select and employ the highest skill and longest experience.

Judgment of General Term, affirming judgment dismissing the complaint, affirmed.

Opinion by *Finch, J.* All concur.

APPEAL. PRACTICE.

N. Y. COURT OF APPEALS.

Philips, respt., v. *The Germania Mills, applt.*

Decided Oct. 18, 1887.

On appeal from an order, made on additional papers, vacating an order made by another judge the first order is not under review, and the judge who made it may properly sit on the hearing of such appeal.

Whether on all the papers before it there were sufficient facts to justify the examination of an officer of the defendant to be examined before trial rests in the discretion of the General Term and an appeal will not lie from its determination.

Plaintiff, who was in the employ of defendant, a Massachusetts corporation, under a contract whereby he was to receive a share of the profits as compensation for his services, brought this action to recover such share. On March 18, 1887, an order was made by Van Brunt, J., under § 872 of the Code, requiring S., a director and the treasurer of defendant to appear

on March 28, 1887, to be examined "pursuant to the provisions of the Code of Civil Procedure in such cases made and provided." On that day defendant moved before Patterson, J., at Chambers, to vacate the order of Van Brunt, J., upon the papers on which the order was granted and an affidavit of S. and other papers. After hearing counsel for both parties an order was made vacating the order for the examination of its books. That stipulation was given. Plaintiff appealed to the General Term where the order of Patterson, J., was reversed and the order of Van Brunt, J., reinstated with costs and disbursements, and the examination of S. set down for Aug. 15, 1887. The General Term was composed of Judges Van Brunt, Daniels and Bartlett, Van Brunt, J., writing the opinion. Defendant appealed to this court claiming that the General Term was not properly constituted and that § 8 of Art. 6 of the Constitution, which prohibits a judge or justice sitting at a General Term or in the Court of Appeals "in the review of a decision made by him or of any court of which he was at the time a sitting member," was violated.

Joseph H. Shoudy, for applt.

Larned & Curtis, for respt.

Held, Untenable; that the order of Van Brunt, J., was not under review at the General Term, but the order of Patterson, J., which was based upon additional papers and not upon the same presented to Van Brunt, J.; that the motion before Patterson, J., was not an

appeal from the order of Van Brunt, J., but a new and distinct proceeding; that the only question for the General Term to determine was whether upon all the papers appearing before Patterson, J., he properly vacated the prior order.

Whether upon all the papers before the General Term there were sufficient facts to justify the examination of S. under said section of the Code rested in its discretion.

Appeal dismissed.

Opinion by *Earl, J.* All concur.

PARTITION. SALE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

David L. Reed, *respt.*, v. Alfarretta Reed et al., *appls.*

Decided Oct. 26, 1887.

After a sale of real estate has been made and confirmed by a final judgment in an action in partition, it is final and conclusive against all the parties thereto and their legal representatives, although such action was brought by a person, such as tenant by the courtesy, forbidden to institute or prosecute it, and there is no exception in this respect in favor even of infant defendants.

Appeal from an order denying motion made by the purchaser, Abraham Bernheimer, to be relieved from his purchase, and from an order directing him to complete such purchase, pursuant to the terms of sale subscribed by him.

A sale was made under a judgment in partition recovered by plaintiff, whose interest in the

property was that of a tenant by the courtesy. He was forbidden by § 1538 of the Code of Civ. Pro. from being the plaintiff in such an action, and it is mainly for that reason that the purchaser objects to receiving and taking the title under the purchase. But it appears from the case that after the sale was made it was confirmed by the final judgment directed and entered in the action.

Edward D. Bettens, for applts.

John J. Sullivan and Abraham Stern, for resp't.

Held, That the purchaser could not be relieved. When a sale in partition has been confirmed by the final judgment, it has been declared by § 1577 of the Code that it shall be binding and conclusive upon the same persons upon whom final judgment for partition is made binding and conclusive by § 1557 of the Code. And it effectually bars each of those persons who is not a purchaser at the sale from all right, title and interest in the property sold.

The other section here referred to has further declared when the sale may be made by commissioners in partition and confirmed by a final judgment, that it is binding and conclusive upon the plaintiff, each defendant upon whom the summons was served, and the legal representatives of such parties, and being conclusive as it has been so declared to be, the effect of the final judgment is to ratify and legalize the sale, although it may be made in an action commenced by a person interested in the property who has not been

permitted to maintain it. The object of the law evidently has been, after the sale has been made and confirmed, to deprive the parties to the action of all objection to the regularity and legality of the proceedings in the action, and it has made no exception in this respect in favor even of infant defendants. If the objection had been made by the guardian *ad litem*, as it should have been, that this action was commenced by a person forbidden to institute or prosecute it, that objection would have resulted in its dismissal. But it was not raised or presented to the court in any form whatever, and if the interests of the infants in this estate have been in any manner prejudiced, or sacrificed by the omission of the guardian to raise the objection, their remedy will be against him and his sureties in the bond, for omitting to care for and protect them as that might have been done by a reasonable degree of attention devoted to the allegations made in the complaint. See 97 N. Y., 249; 102 id., 165; 98 id., 665.

The case of *Scheu v. Lehming*, 31 Hun, 183, stands no way in conflict with this rule, for there it was not made to appear that final judgment confirming the sale had been rendered. In the absence of such confirmation the court would not require the purchaser to take the title, who urged the existence of such an objection.

The summons and complaint were served upon the infant defendants as that was required to be done by § 130 of the Code of

Civ. Pro., and as they were each under the age of fourteen years, the guardian *ad litem* was legally appointed for them, the next day after the summons and complaint were served, by the court acting under the authority of § 471 of the Code. And the omission to require a bond from the guardian in favor of each of the infants did not divest the court of the jurisdiction it had acquired over them in this manner. Even if a several bond should have been required in favor of each of the infants, the omission to direct it to be given, and permitting one bond for their joint as well as several benefit, was no more than an irregularity, which cannot now be made the subject of objection or complaint by the purchaser. 17 N. Y., 218. In that case the court held that the omission to file the bond required was no more than an irregularity which was afterward amendable by the court. And an offer has been made to correct any irregularity in the form of this bond by executing and filing a bond in favor of each one of the infants if that should be exacted by the purchaser. But he has not insisted upon that being done. He accordingly cannot be relieved from his purchase on account of this alleged defect, even if he should be held right in making the objection. The objection that there may be creditors of the estate having the right to apply for the sale of the property for the payment of their debts, has been answered by the affidavit of one of the defendants, stating that her

mother, who was the preceding owner of the property, left sufficient personal property to pay all claims against her estate.

Orders affirmed.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Bartlett, J.*, concur.

EJECTMENT. EXTRA ALLOWANCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Thompson Burton, *respt.*, v. Or-rissa M. Tremper, *applt.*

Decided Sept., 1887.

In an action of ejectment plaintiff sought to recover by the complaint the whole of certain premises. The answer denied all the allegations of the complaint. Testimony was given as to the possession of the entire premises and the verdict given for defendant was general. After the judge's charge plaintiff's attorney handed to the court a paper describing a small strip of the premises and said that as to that strip he claimed plaintiff's title was established. The value of the whole premises was shown, but not that of this strip. On a motion for an extra allowance the court held that the subject matter involved was the strip and denied the motion upon the ground that its value did not appear. *Held*, Error, that the whole premises were involved.

Appeal by defendant from order denying an extra allowance, such denial being put on the ground that there was no basis for computation.

The action was ejectment and the complaint claimed a lot 61 by 200 feet. The answer denied all the allegations of the complaint; it then denied that the action

could be maintained as to a part of the lot being a strip 10 feet wide in front and decreasing in width as it ran back. On the trial evidence was given that the whole property was worth \$8,000; no evidence was given as to the value of the strip by itself. Evidence was given as to the possession of the whole lot. After the charge plaintiff's attorney, defendant's attorney not objecting, handed to the court a description of a piece of land as to which plaintiff claimed his right and title was established by the testimony. This was a part of the strip above mentioned. Defendant had a verdict. On this motion below the court held that the subject matter involved was this part of the strip, the value of which did not appear.

A. J. Nelles, for applt.

N. C. Moak and *H. B. Cushney*, for respt.

Held, Error. It does not appear why plaintiff's attorney apparently limited his claim by handing up the paper. Perhaps he had entirely failed to prove any title to the other part or that as to it defendant had shown an adverse possession. But on the pleading the whole property was involved. Testimony was given as to the possession of all of it and the verdict was general. And upon sufficient proof plaintiff could have recovered all the land described in the complaint. We think the subject matter involved was the whole premises.

Order reversed.

Opinion by *Learned, P.J.*; *Landon* and *Williams, JJ.*, concur.

ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Louis Straus et al., respts., v. The Chicago Glycerine Co., applt.

Decided Oct. 26, 1887.

Defendant was a corporation doing business in Illinois. An English insurance company being indebted to it for a loss on property in Chicago on a policy issued there, plaintiffs procured an attachment which was served on the New York agent of the insurance company. *Held*, That the indebtedness could not be attached.

Appeal from order denying motion to set aside service of an attachment.

Plaintiffs reside and do business in New York City. Defendant is a corporation existing under the laws of Illinois. It was insured on its property in Chicago by a policy issued by an insurance company existing under the laws of Great Britain, and which had been issued by and through its Chicago agency. A loss having occurred the insurance company became indebted to defendant. Plaintiffs having procured an attachment in this action attempted to levy on this indebtedness by serving a copy of the attachment on the New York agent of the insurance company with notice that such indebtedness was attached. The motion to set aside this service on the ground that the indebtedness could not in this manner be attached was denied.

James Byrne, for applt.

Henry W. Sackett, for respts.

Held, Error. It will not be necessary to determine whether a lawful attachment of the indebted-

ness could be made under subd. 2, of § 649, Code Civ. Pro., without taking actual possession of the policy itself; for this policy was not issued by the New York agency, but the negotiations for it took place in the city of Chicago and it was there delivered to and held by defendant. The indebtedness, accordingly, was not property which defendant had within this State, and under the construction given to the Code in 93 N. Y., 592, it could not be seized under this attachment. It is true that the service of the attachment in that case was attempted to be made upon the shares of defendant in the corporate stock of a company, but that circumstance does not seem to render the decision then made inapplicable to this case. By the shares which the defendant held he was entitled to a proportionate part of the earnings of the corporation and of its property on its dissolution; while in the present case defendant was entitled under the policy to the payment of so much money as would compensate it for the loss sustained by the destruction of its property by fire, so far as the policy covered such loss. The property itself in each case has several attributes of similitude, rendering the decision in the case referred to applicable to the service made of the attachment in this action. Where an action may be here maintained to recover the debt owing by the foreign corporation, as it certainly could be in this case, it has been held in other States that it may be seized by

way of attachment or process of garnishment. 96 Penn., 485; 129 Mass., 444; 28 Mo., 214; 102 Ill., 249. But it is not important to pursue the consideration of other cases, since that in 93 N. Y., 592, maintains the general proposition that the presence of the person or thing within the State is indispensable to the power of the court to acquire jurisdiction over it in this manner.

Myer v. Ins. Co., 40 Md., 595, and *Willett v. Ins. Co.*, 10 Abb., 193, distinguished.

Order reversed and service set aside, with costs.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Bartlett, J.*, concur.

HIGHWAYS. INJUNCTION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

William Benedict, applt., v. Isaiah Calkins, respt.

Decided Sept., 1887.

The title to land was in N. for convenience, it being owned by V. and N. With the consent of N. a contract was made by V. with B. to sell it, the price to be paid in installments. B. paid part and went into possession. He then verbally sold to plaintiff a right to a private road. On the application of B. and plaintiff this was laid out by the commissioners of highways. B. then sold his rights to defendant who had full knowledge of plaintiff's claim. Thereafter defendant paid up in full to V. and N. and received a deed. Defendant blockaded the road. *Held*, That plaintiff was entitled to a perpetual injunction restraining defendant.

V. and N. owned certain land the title for convenience being in N. V. with N.'s consent made an

agreement with B. to sell it at a certain price. B. paid part and went into possession. B. for \$20 paid him by plaintiff verbally sold him a right to a private road over the land. Plaintiff and B. united in an application to the highway commissioners to lay out the road. This application was signed by both, describes the road and recites the payment of \$20. The road was duly laid out under the statute. B. then assigned his contract with V. to defendant. Defendant had knowledge of plaintiff's road and \$100 was allowed in the purchase price for its existence. Soon after defendant paid up all that was due on V's contract and V. and N. gave him a warranty deed. Defendant now blockades the road. The action is for a perpetual injunction restraining this. The court dismissed the complaint.

A. Potts, for applt.

T. A. Niven, for respt.

Held, Error. B. paid part and went into possession. In equity he was owner and V. and N. mortgagees for the unpaid balance. We need not decide whether B. was such an owner as to make the proceedings to lay out the road valid. The facts shown are enough to entitle plaintiff to the road as against B. Defendant became assignee of B.'s rights with full knowledge of plaintiff's claim and was allowed for that in the purchase. He was as much bound to plaintiff as B. had been. Defendant thereafter fulfilled his contract by full payment to V. and N. His equitable estate became a

legal one. But he could not violate plaintiff's equitable rights. Defendant was in privity with B. when he took B's contract. That contract was not forfeited, it was fulfilled.

Defendant says that equity enforces unwritten agreements where they are executory and not when they are executed. This cannot be a sound distinction. One who pays the price and takes possession under an unwritten agreement is in as good a position as one who agrees thereafter and take possession.

Judgment reversed.

Opinion by *Learned, P.J.*; *Landon* and *Williams, JJ.*, concur.

CANALS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

David Wright v. Nelson B. Eldred.

Decided Oct., 1887.

Where the property appropriated by the State was not the property of plaintiff, but plaintiff's property was affected by such appropriation, plaintiff's remedy must be had by presenting and asserting his claim against the State in the manner which is permitted by the statute, and he cannot maintain an action for damages resulting from such appropriation against the officers of the State or those legally acting under their authority.

The superintendent of the Auburn water works company is not within the class of persons excluded from appointment upon the canals as provided in 1 R. S., 250, § 185, as it appears that the right of the water works, company was not adverse to those of the State, and the water taken by them was in no sense taken from the the canals, under the appropriation of water made by the State.

The letter of authority under which defendant acted, by which he was authorized or requested "to close flush gates when the water was lowered sufficiently, and to open them temporarily when it should become necessary" does not come within the rule which does not permit a person charged with an official duty or authority involving the exercise of discretion or judgment, or with an agency of personal trust and confidence to delegate it to another as applied to the case at bar.

Motion by plaintiff for a new trial on exceptions taken at Cayuga Circuit and ordered heard at General Term in the first instance.

Action to recover damages for injury to plaintiff's premises, alleged to have been suffered by the act of defendant in setting water back onto them. Plaintiff's farm is on the west side of the inlet to Owasco lake, and the evidence tended to prove that by means of flush-gates at the upper dam in the outlet of the lake the water was set back, raising it in the lake and inlet, injuriously affecting plaintiff's land for productive purposes. The defense was that the dam and the right to thus obstruct the flow of the water in the outlet had been appropriated by the State for canal purposes, and that defendant in what he did was acting under the authority of the officer of the State having the power to direct to be done the acts complained of. This authority was derived by a letter of March 25, 1881, written defendant by the assistant superintendent of public works, by the terms of which he was authorized or requested to close the gates when the water lowered sufficiently, and to open

them temporarily when it should become necessary, and under this authority he continued to have charge of the gates and they were raised and closed by his direction until Feb., 1884. The authority thus given was approved by the superintendent of public works. The erection of the dam and providing the bulkhead with flush boards or gates were done under the immediate direction of the canal commissioner having charge of the middle division of the Erie canal and made to supply the Port Byron level of that canal with water.

Verdict was directed for defendant.

H. V. Howland, for plff.

Charles M. Baker, for deft.

Held, That the erection of the dam bulkhead and placing of the flush-gates will be deemed, under the legislative authority given by the several acts respecting this work, to have been within the requisite power of the State for the purpose had in view, and that with which its officers performing it were duly vested for the question here. 2 Hill, 342; 19 Barb., 263. The property here appropriated was not that of plaintiff, but his property was affected by the use of that taken by the State, and his remedy would seem to have been that of presenting and asserting his claim against the State in the manner which the statute permitted. For the purposes of this case it is unnecessary further to consider the power of the State under the statutes and its exercise to make use of the means so pro-

vided for storing the water of the lake for canal purposes.

It appeared that defendant was the superintendent of the Auburn water works company, which drew its water from Owasco lake, through a ditch five feet below the crest of the dam, and it was insisted on the part of plaintiff that whatever may have been the authority of the superintendent of public works in application and use of those flush-gates defendant was without authority in that respect, and that he is liable for the consequences of his acts in lowering or closing the gates, because, first, he was ineligible; and second, the authority sought to be given him and which he assumed to be discretionary in character.

Held, That the purpose of the statute providing that no person owning any hydraulic works dependent upon the canals for their supply, or who shall be employed in or connected with any such works, shall be employed as superintendent, lock-keeper, collector of tolls, weigh-master or other agent upon the canals, 1 R. S., 250, § 185, evidently was to exclude from the control or management of the canals all persons having interests adverse to those of the State in the use of the waters of the canals. And when the case of *Shaver v. Eldred*, 38 Hun, 632, was before this court it was assumed that the water works company was dependent for its supply of water upon the canal and water which the canal was entitled to, and that defendant was within the class of persons excluded by

the statute from the relation which his appointment purposed to give, and therefore could not lawfully take or exercise the discretionary power which the letter of authority seemed to give him; but it now appears by Laws of 1857, Chap. 524, that the appropriation authorized by that act to be made by the State was subject to the use of water for hydraulic purposes by the owners of such dam at the time of the appropriation as the same should from time to time be drawn from the dam. The water works company then had been and was taking its water from there and has continued to do so ever since by means of a raceway having its sill five feet below the crest of the dam, and it is controlled independently of the dam, although its supply is supported by it. It seems, therefore, that the water works company does not take its water from the canals within the meaning of the statute; that its interests are not hostile in that respect to the State, and that defendant did not come within the inhibition of the statute, and this case is distinguished from that in 28 Hun, *supra*.

That the relation given to defendant by the letter of authority and assumed by him did not come within the rule which does not permit a person charged with official duty or authority involving the exercise of judgment or discretion or with an agency of personal trust and confidence to delegate it to another, as applied to this case, and defendant may be deemed to have acted under the

authority of the superintendent of public works, and therefore incurred no personal liability. 7 Hill, 357.

Motion for new trial denied and judgment ordered on verdict.

Opinion by *Bradley, J.*; *Haight, J.*, concurs; *Smith, P.J.*, not voting.

LEASE. RENEWAL.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Henry M. Kolasky, *respt.*, v. Wilhelmina Michels, *applt.*

Decided Oct. 26, 1887.

A lease contained a covenant for renewal upon the lessee giving "two monthly notices" to that effect. *Held*, That a notice served more than two months prior to the termination of the lease was sufficient; that two notices was not essential. The action was defended on the ground that the lease was procured by means of false representations made by the original lessee, who was dead at the time of the trial. *Held*, That proof of such representations was inadmissible under § 820.

Appeal from judgment in favor of plaintiff.

Action for specific performance of a covenant to renew a lease. Defense, fraudulent representations made by the original lessee to induce the making of the lease; that it was a personal one, not transferable, terminable on the death of the lessee and a failure to perform the alleged agreements which were an inducement to the making of the lease.

It appeared that in 1881 defendant leased two floors and basement

of a building to one E. for five years, which lease contained a covenant that the lessee "shall have the privilege and option of a renewal of this lease at the expiration of the time hereby demised, upon giving the said party of the first part two monthly notices to that effect previous to the expiration of the lease." Shortly thereafter E. died, leaving a will by which he left all his property to his wife, who was his executrix; she assigned the lease to one P. and he to plaintiff about May, 1885. About three months before the lease expired plaintiff served notice requesting a renewal on defendant, who refused to do so and subsequently served. There was no other notice served by plaintiff.

Thomas Bracken, for *applt.*

James M. Baldwin, for *respt.*

Held, That plaintiff proved a substantial compliance with the conditions on which a renewal was to be granted. Defendant insists that two notices were essential. We do not think so. It is altogether probable that the phrase "two monthly notices" was mistakenly used instead of "two months' notice," as it is difficult to perceive what could be the purpose of requiring two notices to be served at the same time a month before the lease expired. But in any event, the fact, which is apparent from the whole record, that defendant did not mean to renew the lease on the same terms under any circumstances, irrespective of the question of notice, renders this objection immaterial.

The main defense was that de-

fendant was induced to execute the lease by false representations of E. and by his assurance that in the event of his death the lease would terminate. Defendant was the sole witness on her behalf, and the testimony offered by her on these points was excluded on the objection that it was immaterial, incompetent and inadmissible.

Held, No error. She could establish the defense only by testifying to personal transactions or communications with her deceased lessee, from whose executrix plaintiff derived the interest in the lease which enabled him to prosecute the action. Such testimony is forbidden by § 829, Code Civ. Pro., and the trial judge properly excluded all questions coming within the prohibition of that section. This left the defense without any evidence to sustain it, and plaintiff was entitled to judgment.

Judgment affirmed, with costs.

Opinion by *Bartlett, J.*; *Brady* and *Daniels, JJ.*, concur.

ASSIGNMENT FOR CREDITORS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

In re assignment of Reynolds Carpenter.

Decided Sept., 1887.

Upon an accounting by an assignee under the General Assignment Act, Chap. 466 of 1877, a creditor may show that the assignee was negligent in failing to reduce to possession assets which had been fraudulently transferred by the assignor before the assignment; and, in case of a plain violation of duty, the assignee may

be charged with the amount and this although the fraudulent holders of such assets are not and cannot be parties to the proceeding.

The question of neglect, however, is one to be decided by the circumstances of each case, regard being had to how the matter might have seemed to the assignee at the time and not as it might have been made to appear after long investigation; regard being had also to the question whether there was a prospect of a beneficial recovery.

Carpenter and another made a general assignment May 17, 1879, to one Cornell. In Nov., 1880, on the petition of creditors Cornell was removed and one Mann put in his place, but prior to this Cornell had applied for a final accounting and this was proceeded with after Mann's appointment. The referee therein reported and charged Cornell with \$71,132 mainly for property transferred by the assignors before the assignment and which Cornell had not reduced to possession. The county judge being disqualified, at Special Term, an order was made largely reducing the amount charged against Cornell and the court struck out all evidence taken by the referee relating to acts and proceedings of the assignors prior to the making of the general assignment. The creditors who had Cornell removed appeal from the order at Special Term.

E. Countryman and *James Lansing*, for applts.

Levi Smith and *R. A. Parmenter*, for resp't.

Held, Error. The proceeding is taken under Chap. 466, Laws of 1877, § 20, subd. 1 and 3. We think that herein a creditor may

show that the assignee has been negligent in failing to recover property fraudulently transferred by the assignors before the assignment. 100 N. Y., 219; Williams on Exrs., 1804, *et seq.*; 92 N. Y., 40; 1 Tucker, 95; 11 Wend., 361. By Chap. 314, Laws of 1858, assignees have power to disaffirm acts done in fraud of the rights of a creditor. If an assignee has the power an improper or unreasonable refusal or neglect to exercise it must be a violation of his duty. However when the question of duty arises it involves in each case an inquiry into the assignee's knowledge and into the prospects of a recovery beneficial to the estate; and he should only be held for a plain violation. And his neglect should be judged by matters as they appeared or might have appeared to him at the time and not as they may appear on subsequent labored investigation. The evidence struck out, is, however, printed in the case and from an examination of it we think the referee was right.

It is said that the time which the creditors petitioning allowed to elapsed before moving is a defence. We think not. Cornell was their trustee and was bound to a faithful discharge of duty.

It is also said that the question of fraudulent transfers cannot be litigated unless the fraudulent holders are parties. They cannot be parties and this accounting does not bind them. Yet where an inquiry is made as to the fidelity of an assignee it must be proper to

show what property he might have reduced to possession.

The General Term modified the referee's report as to a few small items.

Order modified as per opinion and without costs to either party.

Opinion by *Learned, P.J.*; *Landon, J.*, concurs.

EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

George Schwander, admr.,
applt., v. Martin H. Birge, *respt.*

Decided Oct., 1887.

In an action brought against an employer for alleged negligence in failing to provide proper and sufficient means of egress for his employees in case of fire; when such a description of the building and of the means of egress can be given as to convey to the jury an intelligent understanding of the situation, the rule requires that the testimony of witnesses shall be confined to a statement of the facts, and that the conclusions or opinions of witnesses be not permitted as evidence. Expert testimony can only be given when elements enter into the subject which cannot be described by witnesses so as to possess the jury with the information requisite to a complete understanding of the subject of inquiry.

Appeal from judgment entered on verdict.

Action to recover damages resulting from the death of plaintiff's intestate, alleged to have been occasioned by the negligence of defendant, who was engaged in the manufacture of wall paper, at the city of Buffalo, in a five-story building which was destroyed by fire, and by such fire plaintiff's intestate, who was em-

ployed by defendant, lost his life. The negligence of defendant charged was his alleged failure to provide suitable means or facilities for his employees to escape from the building at the time of the fire. The rules of law governing the case were declared on a former appeal of the same case and can be found in the opinion of the court in 33 Hun, 186. The facts are substantially the same. The main controversy had relation to the situation of the fifth story of the building and in respect to the means of egress furnished from it. There was only one stairway leading from it, and a door from it to the roof of an adjoining building. And there was a scuttle to which there were no stairs or ladder. Upon the subject of the adequacy of the means of egress a witness for defendant was asked, "Was that in your judgment a proper and sufficient mode of access and egress from the building under any circumstances that might occur?" To which the objection, on the ground that "it was for the jury, and incompetent and improper," was overruled and exception taken. Without taking any answer, the further question was asked: "From the experience that you have had, and in exercising your judgment in relation to the preparing of the building and the room for the work and the manufacturing carried on there, did you regard the stairs and this door as sufficient and proper modes of egress if any accident occurred?" To which objection was taken; overruled and

exception. The witness answered: "I always looked at it in that light." And later on the same witness testified that in his judgment all precautions that were needful were taken to make this factory and the business that was carried on there safe; to which defendant's counsel was permitted to take exception.

Adelbert Moot, for applt.

William B. Hoyt, for resp't.

Held, That the exception goes only to the competency of the evidence. And as suggested by the objection the question, whether the means of egress were reasonably sufficient and all that due care required of defendant to provide for his employees was for the jury. That was one of the vital questions to be determined by them, and it is difficult to see that it comes within the rules permitting the opinions of experts. This building was 161 feet in length and 47 feet in width, and the evidence tends to show that the room occupied the entire space on the fifth floor between the outer walls. The location of the stairs and the door, the distance from them to remote parts of the room could be stated and an ample description of the room given, so as to convey to the jury an intelligent understanding of the situation, and when that is the case the rule requires that the testimony of witnesses be confined to a statement of the facts and that the conclusions or opinions of witnesses be not permitted as evidence. 97 N. Y., 507; 84 id., 57. But when elements enter into the subject of in-

quity which cannot be described by witnesses so as to possess the jury with the information requisite to a complete understanding of it, the opinions of experts may be received. We think that the situation and condition of the premises and the facilities of egress were such as could be clearly described by evidence, and did not come within the rule permitting the opinions of witnesses. And as it cannot be known whether this evidence affected the result, but it may have done so, the error cannot be disregarded.

Judgment reversed and new trial granted.

Opinion by *Bradley, J.; Smith, P.J.*, and *Barker, J.*, concur.

CONTRACT. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Charles Hyde, *respt.*, v. William Payne, *applt.*

Decided Oct., 1887.

The evidence as to what the contract in fact was between plaintiff and defendant was conflicting, and plaintiff made tender of payment by leaving the purchase price of the sheep he had agreed to buy at the price which by his version of the contract he had agreed to pay, which sum defendant had refused to accept and deliver the sheep, denying that such was the agreement. *Held*, That it was error for the court to charge "that the payment of the money by plaintiff to defendant's daughter for the benefit of defendant is evidence of the good faith of plaintiff in carrying out the agreement made or alleged to have been made by plaintiff with defendant," the effect of the evidence and its bearing on the disputed question of fact was not a question of law for the court but a matter of inference for the jury.

Appeal by defendant from judgment entered on a verdict.

Action to recover damages for refusal of defendant to perform a contract alleged to have been made by him with plaintiff to sell and deliver seventy sheep. It appeared that on the 12th of Jan., 1884, an agreement was made between the parties for the sale by defendant to plaintiff of sheep, to be delivered a month thereafter at five and one-half cents per pound; that on Jan. 15, plaintiff called on defendant and the contract was modified and the sheep were to be delivered the next day or within two or three days following. Plaintiff claimed and his evidence tended to prove that the agreement was so modified that he was to take the sheep at \$4.75 per head, and they were to be delivered to him. Defendant claimed by his evidence that he agreed to so sell and deliver the sheep to plaintiff at such price provided one Hampden, who was with plaintiff, took at the price of \$4.75 per hundred pounds fifty other sheep which defendant had recently purchased. On the following day plaintiff, on his way to defendant's place for the sheep, met defendant going away from home, and offered to pay him for the sheep and wanted to get them and defendant refused to let him have them unless Hampden took the fifty others at the price mentioned. The latter did not propose to take them. Plaintiff then went to defendant's house and left with defendant's daughter, being absent, the requisite amount of money to pay with

what had been advanced for the seventy sheep at \$4.75 per head.

Plaintiff's counsel asked the court to charge the jury "that the payment by plaintiff to defendant's daughter for defendant's benefit of the money is evidence of the good faith of plaintiff in carrying out the agreement made or alleged to be made by plaintiff with defendant." The court remarked, "I think that is correct. They claim that the evidence tending to show that plaintiff was acting in good faith and believing that he made a *bona fide* contract with defendant, I charge that," to this defendant's counsel excepted.

J. H. & C. W. Stevens, for applt.

D. H. Holliday, for respt.

Held, That such charge was error; that the main contest of fact on the trial relates to the contract between the parties, and in view of the conflict of the evidence the question was one of fact upon which the finding of the jury either way may have been deemed supported on a review. The effect of evidence and its bearing upon this controverted fact was for the determination of the jury, and whether the evidence or fact that the payment of the money to the daughter tended to prove anything more than it necessarily imported was not a question of law for the court, but was matter of inference for the jury solely.

Judgment reversed and new trial granted.

Opinion by *Bradley, J.; Smith, P.J., Barker and Haight, JJ.*, concur.

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PROMISSORY NOTE. CONSIDERATION.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Henrietta Hoxie, v. Anna E. Kennedy et al., exrs.

Decided Oct., 1887.

A note given to a third party by a debtor on account of a debt owing by him if made in pursuance of some understanding between the creditor and the debtor would have for its support a valuable consideration, and such third party, inasmuch as he was named as payee in it, can maintain an action upon the note in his own name, whatever view might be taken of the question, whether or not such payee, as between himself and the creditor, was beneficially interested in the proceeds of the note.

The bar to recovery by a discharge in bankruptcy may be removed by a new promise, and liability restored, but an objection that the promise was made to a third party who was a stranger to the transaction would be good, because the promise must be made to the creditor. In this case, however, that was a question of fact for the jury.

Where a note has been destroyed while in the possession of plaintiff, he is not required to give indemnity as provided by § 1917 of the Code as a condition of recovery.

Motion for new trial on exceptions taken at the Cayuga Circuit and ordered heard at General Term in the first instance.

Action on a promissory note which the evidence tends to prove was made by defendant's testator for \$3,750, dated Jan. 20, 1880, and payable to plaintiff or order on demand, with interest from Sept., 1877. Plaintiff was nonsuited. Among the grounds for the motion for a nonsuit were these: That the note was without consideration;

that plaintiff was not the real party in interest; that the testator had been discharged in bankruptcy and the promise made in the note was ineffectual to support the action. The evidence tended to prove that testator some years before the note was made became indebted to his brother, the father of plaintiff, and that this note was made to her on account of such debt. Defendant's testator was discharged in bankruptcy in 1879, and the debt due from him to his brother existed before that time.

Turk & Barnum, for plff.

Drummond & Nellis, for defts.

Held, That the fact that the note was given to plaintiff on account of a debt owing her father would not aid plaintiff unless it appeared that it was given in pursuance of some understanding with the creditor to that effect. Upon that subject a witness present when the note was made and delivered testified that defendant's testator at that time said to plaintiff: "I give you this at your father's request to show my indebtedness to him; I have not the money now, and can't pay it, but will pay you." That he said it was his brother's request that he should make the note to plaintiff. And another witness testified that in a conversation with the testator the latter said that he had given plaintiff this paper to secure her the debt he owed her father; that there had been an agreement between them to that effect; that he told how the debt arose, and said they had had a settlement and the amount of the note was due his brother.

This evidence permitted the conclusion that the note was made to plaintiff pursuant to an arrangement between the testator and plaintiff's father, and by request of the latter on account of an unpaid debt which he had owed him for some time. And these facts if found by the jury would establish the fact that the note had for its support a valuable consideration, and inasmuch as plaintiff was named as payee in it she might maintain an action upon it in her own name, whatever view might be taken of the question whether or not she was beneficially interested in the proceeds of the note as between her and her father, because being such a party to the instrument she would be deemed a trustee of an express trust, if it was in fact made to her for the benefit of her father by his consent or request. Code Civ. Pro., § 449; 22 N. Y., 389; 65 id., 6.

That the bar to recovery by a discharge in bankruptcy may be removed and liability restored or given by a new promise. 53 N. Y., 521, 24 Hun, 221. The obligation that the promise to plaintiff was not effectual would be good if plaintiff could be treated as a stranger to the transaction, because the requisite promise must be made to the creditor or to a person receiving it in his behalf or in some manner representing him. 4 Wend, 420; 8 N. Y., 362; 9 id., 85; 7 Hun, 230. Under the evidence in this case that question was one of fact for the jury.

The evidence tended to prove that the note while in the posses-

sion of plaintiff had been destroyed by fire.

Held, That in such case plaintiff was not required, if the jury should find that in fact it was so destroyed, to give indemnity as provided by § 1917, Code Civ. Pro. 16 N. Y., 582. The nonsuit is not supported on the ground that plaintiff failed to give indemnity.

We think the court erred in withdrawing the case from the jury and in directing a nonsuit.

Motion granted.

Opinion by *Bradley, J.; Smith, P.J., Barker and Haight, JJ.*, concur.

DECEDENTS' ESTATES. REFERENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

George Hovey, admr., *applt.*, v. Simeon Hovey, *respt.*

Decided Oct., 1887.

The statute providing for the reference of claims against a decedent does not contemplate affirmative relief against the claimant further than is requisite to defeat a recovery.

A stipulation made in a proceeding pending before a referee appointed under such statute, by which it is sought to confer upon the referee power in excess of that permitted by the statute, will not have the effect to extend the jurisdiction of the referee, nor will it have the effect to produce an arbitration, and make the referee's report a common law award.

The questions arising on the result given to such stipulation by the report of the referee can only arise upon a motion for confirmation or review as the practice in such case requires.

Appeal from judgment entered

on dismissal of complaint at Circuit.

Defendant having presented a claim to plaintiff as administrator, which was rejected by the latter, the matter was referred under the statute and tried before the referee, who made a report against defendant, the claimant, for \$506.26. Plaintiff, treating it as an award of an arbitrator, brought this action to recover the amount of it. It appeared that during the hearing before the referee an oral stipulation was made between the parties to the effect that he was authorized by them to pass upon all matters existing between the parties and appearing between them. The trial court held that the remedy of plaintiff was to be sought by an application for the confirmation of the report of the referee, and dismissed the complaint.

Robert Snow, for *applt.*

I. Sam Johnson, for *respt.*

Held, That the statute providing for the reference of claims against a decedent, 2 R. S., 88, § 36, does not contemplate in such proceeding affirmative relief against the claimant further than is requisite to defeat his recovery. 88 N. Y., 453.

That the oral stipulation made between the parties at the hearing before the referee seems to have been made in the proceeding, and the question arising upon the result given by the report is whether any portions of the claims of the respective parties was improperly allowed, and whether the affirmative relief given to the administra-

tor was within the power of the referee in such proceeding. With this question we have nothing to do, treating the proceeding as within the statute. That can arise only upon the motion to confirm the report, to review as the practice in such cases requires. The parties could not give to the proceeding jurisdiction which it did not possess; and whether an agreement of the parties to permit a recovery of any balance due the representative of a decedent from the claimant may be effectual in such a proceeding depends upon the question whether it is a matter of practice or jurisdiction of subject matter, which in the view taken it is unnecessary here to determine.

That the construction to be given to this stipulation depends upon the purpose with which it was made. They were proceeding under a statutory reference which was subject to review, on which any error in the proceeding might be considered; and there is no opportunity to find in the stipulation entered upon in the progress of the proceeding anything which tended to show that the parties intended to go outside of it for the purpose of settling the controversy. If they sought to confer a jurisdiction upon the referee which he could not take in the proceeding the effort to do so was ineffectual. Such attempt would not have the effect to convert the proceeding into an arbitration unless the purpose was clearly manifested to change the proceeding from that which was being heard into an arbitration and the rela-

tion of the referee to that of an arbitrator. The fact, if it be so, that the parties attempted to confer upon the referee in the proceeding a power in excess of that permitted by the statute did not have the effect to produce any arbitration and to make his report a common law award.

Judgment affirmed.

Opinion by *Bradley, J.; Smith, P.J., and Childs, J.*, concur.

VAGRANT CHILDREN. JURISDICTION.

N. Y. COURT OF APPEALS.

The People *ex rel.* Van Riper, *respt.*, v. The N. Y. Catholic Protectory, *applt.*

Decided Oct. 4, 1887.

A charge that a child was found improperly exposed and neglected and wandering in a park without proper guardianship, and was found in company of a reputed prostitute, is not sufficient under § 291, Penal Code. An allegation that she was exposed by those who had charge of her is necessary.

Where the commitment recites that the conviction proceeded on satisfactory evidence of the charge, and such recital is not contradicted, the admission by demurrer of other facts in the traverse tending to show a wrongful conviction furnishes no ground for a discharge.

Where, however, no notice was given to the father of the child and he was not present at the examination no jurisdiction is acquired by the justice, although the mother was present and is the relator.

On granting or affirming an order of discharge the General Term has no authority to give costs.

On Oct. 3, 1886, Florence Van Riper, aged fourteen years, was brought before a police justice in the city of New York, charged

with having been on that day found "improperly exposed and neglected and wandering in the public park, to wit, the Union Square Park in said city, without any proper guardianship; that the said child was found in the company of one Mary Ryan, who is a reputed prostitute, in violation of the provisions of the Penal Code." The justice on the same day examined the charge and after hearing the witnesses adjudged that the charges were true and committed the child to the defendant, "to be and remain under the guardianship of said corporation until therefrom discharged pursuant to law." The only evidence in the record of the proceedings before the justice is found in the complaint and commitment while recited that the material allegations of the complaint were proved. The arrest was made under subd. 2 of § 291 of the Penal Code, which provide that a female child, "who has been abandoned or improperly exposed or neglected by its parents or other person having it in charge," may be arrested.

Eldridge T. Gerry, for applt.

Dennis McMahon, for respt.

Held, That no case under said provision of the Penal Code was made out; that an allegation that the child was exposed by those who had charge of her was necessary, that it must be shown that the child was abandoned, neglected or exposed by the parents or those in whose custody she was. The information in this case should be precise and show clearly a case within the statute. *Holt* 215; 3 *Den.*, 91.

Writs of *habeas corpus* or *certiorari* were obtained, the defendant made return thereto which averred its incorporation and that under its charter and § 292 of the Penal Code the commitment was made. Attached to the return was a copy of the commitment which recited that the conviction was had upon the charge made being proved. The return was traversed by the relator alleged that the child had done no act prohibited by § 291 of the Penal Code, but was in the park at the time charged for an innocent and lawful purpose and had parents in Hoboken, N. J., with whom she resided. To this traverse the defendant demurred.

Held, That as the commitment recites that the conviction proceeded upon proof by competent and satisfactory evidence of the charge made and this recital was not contradicted, the admission of the facts alleged in the traverse furnishes no ground for the discharge of the child; that the complaint was sufficient that although the admitted averments of the traverse showed a wrongful conviction, but it cannot be inferred that no evidence justifying the findings of the justice was produced before him. A re-trial upon the merits cannot be had in these proceedings. 1 *B. & B.*, 482; 5 *Hill*, 164; 2 *Smith's L. Cas.*, 976, 992, notes.

It was claimed that the justice acted without jurisdiction because no notice was given to the father of the child and he was not present

on the examination but her mother was.

Held, That no jurisdiction was acquired by the justice. 101 N. Y., 195; 19 Wend., 16; that the fact the father is not the relator and does not make the application for the discharge has no bearing upon the legal question involved.

On granting or affirming an order of discharge the court below has no authority to give costs.

Order of General Term, affirming of discharge, modified as to costs and as modified affirmed.

Opinion by *Andrews, J.* All concur.

SERVICES. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Elizabeth De Witt, *respt.*, v. Peter De Witt, *applt.*

Decided Oct. 26, 1887.

In a proceeding to recover the value of services in nursing and caring for a testator on an agreement that plaintiff should be reasonably paid therefor evidence as to the scale of prices fixed by the nurses of the New York Hospital is irrelevant and inadmissible to support plaintiff's claim.

In such a case interest on the amount found to be due cannot be allowed.

Appeal from judgment entered on report of referee from order confirming such report and from order granting costs to plaintiff.

Plaintiff presented a claim to defendant for the sum of \$1,130 for nursing and caring for his testatrix in the years 1884 and 1885, and the same was referred under the statute. There was no agree-

ment between testatrix and plaintiff for the payment of any fixed sum for these services, but it was agreed that she should be reasonably paid. Evidence was given tending to show the value of such services. During the trial one C. stated that a scale of prices had been fixed by the nurses in the New York Hospital. He was asked what those prices were. This was objected to as irrelevant, but the objection was overruled and the witness answered: "The prices established by several of the principal training schools vary from \$20 to \$25 per week, according to whether the case is contagious or non-contagious. The board is also expected, and also the washing of the nurse." He also testified that the services in this case were equal in character and skill to those which would be rendered by a trained nurse.

John P. Reed, for *applt.*

H. M. Whitehead, for *respt.*

Held, That the admission of this testimony was erroneous. The latter evidence was introduced to render the prices fixed by the New York Hospital nurses applicable to this case as evidence in favor of the claim made by plaintiff, and from its effect the referee was enabled to apply the prices so fixed by the nurses, as evidence supporting plaintiff's claim. But what the nurses in the hospital had fixed as prices for the services of nurses was not admissible evidence tending to prove the value of those for which compensation was claimed on the trial. As to this claim, what they had done was merely

the expression of their unsworn conclusions concerning the value of such services, while defendant was entitled to have their value proved by testimony elicited under the solemnity of an oath, and to have the witnesses from whom it might be obtained subjected to the right of cross-examination. Neither he nor testatrix had in any form agreed to become bound by any scale of prices which those nurses had in their judgment fixed, and what they had done toward fixing or adopting a scale of prices could have no relevancy or effect on the trial concerning the measure of compensation which plaintiff was entitled to receive. As to this dispute, this evidence consisted in the unsworn statements or conclusions of the nurses of the New York Hospital, and no rule of evidence has been referred to permitting this description of testimony to be received to support the plaintiff's claim in such a contest as this.

Also held, That the allowance of interest was erroneous. The claim was unliquidated. It depended wholly on the valuation which should be shown to be reasonable for the services appearing to have been rendered. And to the amount of such a claim as it may be found to be finally established interest has not been permitted to be added. 17 Barb., 454; 60 N. Y., 106.

Judgment and order of confirmation reversed and report set aside for error in admission of evidence, and new trial ordered, costs to abide event.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Bartlett, J.*, concur.

CONTRACT. CONDITION PRECEDENT.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

Julia F. Kirtz, admrx., *respt.*,
v. Hezekiah Peck, *applt.*

Decided Oct., 1887.

Where a provision of an executory contract may be treated as a covenant rather than a condition, its importance and effect in an action for the consideration money depends upon the fact whether it is a substantial part of the contract and of the consideration for defendant's promise to pay, and where nothing appears to prove or from which it can be inferred that it forms a substantial part of the consideration an offer of performance is not prerequisite to the plaintiff's right of action.

It cannot be said there is a question for the jury on the facts when both parties to the action treat the questions in controversy as questions of law only, and the court is not requested to submit any questions to the jury.

Appeal from judgment entered on verdict and from order denying motion for a new trial.

This action was brought on a promissory note for \$1,500, payable to the order of plaintiff's intestate on the first day of March, 1876, with interest. Defendant by his answer alleges that prior to May 19 he had purchased of plaintiff and her husband a farm; that they refused to deliver possession unless paid for it; that the matter was compromised at the sum of \$1,500, and the agreement hereinafter mentioned was made with her, and

the release mentioned in the agreement has not been executed or delivered, and to do which she refused. It appeared that defendant and plaintiff's intestate made an agreement under seal that "she, in consideration of the sum of \$1,500 to her in hand paid," agreed to release, quit-claim and set over to defendant all her right, title and interest in premises theretofore conveyed to him by her and her husband, she to remain in possession of the house and the use of the garden until April, 1876, and agreed to surrender the residue of the farm, and he to have all the spring crops then on the premises; and she agreed to procure her husband's release if he in any way has any right to the premises, and then follows the provision: "It is understood and agreed between the parties to this agreement that when the party of the first part shall pay the said \$1,500 as aforesaid, the party of the second part and her husband shall release and discharge the party of the first part from all claims, dues and demands which they or either of them may have against the party of the first part." The evidence tends to prove that this agreement and the note were made at the same time; that some time before then defendant had advanced to plaintiff's intestate and her husband money and had taken two deeds of the farm, absolute in form, but intended as security for the money loaned. And defendant testified: "I gave this note, took this contract and plaintiff was to procure releases of her-

self and her husband, and this \$1,500 note was given for their interest in the farm, and they were to give me possession of the farm and the release spoken of in the contract to make my title good," and then adds that she has not given or offered this release to him. The court having declined to direct a verdict for defendant directed a verdict for plaintiff for the amount due on the note, defendant excepted.

J. M. Dunning, for applt.

J. D. Decker, for resp't.

Held, That the provision in the contract in question relating to release of claims, dues and demands against defendant may be treated as a covenant rather than a condition, and its importance and effect in this action may depend upon the fact whether it is a substantial part of the contract or of the consideration for defendant's promise to pay. In terms the consideration for the payment is in the agreement to release and quit-claim to defendant the interest in the farm and crops there growing and to deliver possession of it to him; and the promise to release claims, etc., against him has the appearance of a stipulation somewhat disconnected with these covenants, and as nothing appears tending to prove or from which it can be inferred that any such claims existed against him, the inference is fairly permitted that the provision in question for release of all claims against him was independent of the consideration for which the note was given and without any substantial purpose for practical

utility, and therefore offer of performance was not a prerequisite to plaintiff's right of action. 14 Barb., 564.

That if it may be said there was a question of fact for the jury, whether or not the provision in question for release of all claims, etc., was independent of the consideration for which the note was given, etc.; that was disposed of by the court, inasmuch as defendant treated the questions arising upon the evidence as of law only, and did not request the submission of any question of fact to them. 8 N. Y., 287.

Judgment affirmed.

Opinion by *Bradley, J.*; *Haight* and *Corlett, JJ.*, concur.

NEGLIGENCE. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Charles Stone, admr., *applt.*, v. The Dry Dock, E. B. & B. RR. Co., *respt.*

Decided Oct. 26, 1887.

An injury can be voluntary only where the party is aware of the danger to which another is subject, and realizing the inevitable result performs the act which inflicts the injury.

In an action for negligence where there is no evidence as to the capacity or intelligence of the injured infant there is nothing on which the jury could base a finding as to whether it was *sui juris* or not, and the court may properly determine that question.

Appeal from judgment dismissing complaint.

Action for damages for the death of plaintiff's daughter, caused as alleged, by the negli-

gence of defendant's servants. Deceased was seven years and three or four months old, and on the day of the accident was playing in the basement of plaintiff's store a block away from the place where the accident occurred. She left the basement and proceeded along the street and attempted to cross, when a car of defendant's approached rapidly, the driver's face being turned toward the inside of the car, and struck and injured her so that she died. There was no evidence that she looked in either direction before starting to cross, and it appeared that if she had looked there was nothing to prevent her from seeing the car. Witnesses who saw the accident stated that she did not look. No evidence was given as to the capacity or intelligence of the child.

It is claimed that a recovery could be had because as the driver if he had been attending to his business instead of looking in the car, could easily have seen deceased and avoided the danger, and the danger was therefore a voluntary one.

Adolph L. Sanger, for *applt.*

John M. Scribner, for *respt.*

Held, Untenable. An injury can be voluntary only when the party is aware of the danger to which another is subject, and realizing the inevitable result performs the act which inflicts the injury. In the case at bar there is no evidence that the driver was aware of the danger of deceased until too late to avoid the injury. He may have been guilty of negli-

gence in not paying proper attention to his duties, but there is no evidence of voluntary injury.

Also held, That if the infant was *sui juris*, then clearly under the authority of 91 N. Y., 420, she was guilty of contributory negligence in not avoiding the danger.

It is claimed that the court usurped the function of the jury if deciding without any evidence that the infant was *sui juris*.

Held, Untenable. It is difficult to see how, if no evidence on this subject was offered, the court usurped the function of the jury, as the jury are to pass on the evidence and cannot be allowed to guess for the want of evidence. It was incumbent on the part of plaintiff to prove want of contributory negligence, and this he could only do if the infant was *sui juris* by showing that the child took reasonable precaution in crossing the street, or if not *sui juris* that the parents had not been guilty of negligence in permitting the child to be on the street unattended. As no evidence whatever was offered as to the capacity or intelligence of the child, there was no evidence on which the jury could base a finding one way or another. A child seven years and four months may be *sui juris*, 91 N. Y., 420, and if the child was *sui juris* she took no precautions whatever in crossing the street to avoid the danger of approaching cars, as she was bound to do. Plaintiff's case seems to have been fatally deceptive in this particular, and the jury were properly relieved from

the duty of speculating in the absence of evidence on this subject.

Judgment affirmed, with costs.

Opinion by *Van Brunt, P.J.*; *Daniels, J.*, concurs; *Barlett, J.*, dissents.

FRAUD. LIMITATION.

N. Y. COURT OF APPEALS.

Piper, applt., v. Hoard, respt.

Decided Oct. 11, 1887.

Where a party defrauded, at the time of discovery of the fraud, is neither an idiot nor lunatic, but with legal capacity to act and sufficient ability to understand, the statute of limitations begins to run against him irrespective of the degree of intelligence possessed by him and whether he has enough courage and independence to resist hostile influence and assert his rights or not.

The withdrawal of an action for such fraud and a new settlement which is also found to be fraudulent may give a new right of action, but does not suspend the existence of the old one.

An allegation that the cause of action did not accrue within six years before the commencement of the action is a sufficient plea of the statute.

This was an action by plaintiff as sole heir of her father, to set aside a deed made by him in Feb., 1859, to defendant, and a subsequent settlement which confirmed it, on the ground that both were the product of fraud and undue influence. This action was commenced in Feb., 1881. It was found by the court that for a period of sixteen years before his death in March, 1875, plaintiff's father could have maintained an action for the relief now sought, and during that period he had full knowledge of the fact constituting the fraud; that while he was

somewhat weakminded, he was able to know and comprehend the facts which transpired; that he had made the deed to defendant and the consideration for it, and he was expressly told that the deed could be avoided for fraud, and after the whole matter had been explained to him not only by his wife but by the counsel chosen to protect and enforce his rights, he consented to the commencement of an action which alleged that fraud and sought to rectify it. Soon after this defendant induced plaintiff's father to discontinue his action, making a new arrangement with him to which his wife was a party, and assuming a new liability as a consideration for the conveyance. This settlement the jury and court found was fraudulent. Defendant pleaded the statute of limitations as a defense to this action.

A. M. Beardsley, for applt.

E. La Grange Smith, for resp't.

Held, That as at the time of the discovery of the fraud, plaintiff's father was neither an idiot nor lunatic, but had a legal capacity to act and sufficient mental ability to understand, the statute of limitations commenced to run against him irrespective of the degree of intelligence possessed by him and whether he has enough courage and independence to resist a hostile influence and assert his rights or not; that while the withdrawal of the action by plaintiff's father and the new settlement with defendant might give a new right of action it could not suspend the existence of the old one.

The answer set up that the cause of action did not accrue within six years before the commencement of the action.

Held, That this was a sufficient plea of the statute of limitations.

Judgment of General Term, affirming judgment for defendant, affirmed.

Opinion by *Finch, J.* All concur, except *Earl, J.*, not sitting.

EMINENT DOMAIN. AMENDMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

In re petition of the Metropolitan Transit Co. to acquire title to land.

Decided June 24, 1887.

Chapter 833, Laws of 1872, as amended by Chap. 686, Laws of 1881, contemplates two important objects for which compensation shall be made; for the real estate required for the construction of the road and for the authority to construct and operate, and these objects may be acquired under two separate proceedings. Under said act an amendment may be made changing the action from one to acquire the lands to one to fix the compensation to be paid the city for the right to construct and operate.

Appeal from order directing amendment of petition.

Petitioner was incorporated under Chap. 833, Laws of 1872, and brought this proceeding to acquire title to land for the purpose of its incorporation. Certain other persons and corporations were permitted to be made parties on their application. Thereafter petitioner applied for leave to amend the petition.

The original petition alleged "that the real estate, property, rights, franchises and interests which your petitioner now seeks to acquire are all those certain pieces or parcels of land situated in said city and county now owned by the mayor, etc., of the city of New York, * * * which constitute the streets and portions of avenues therein which are included in the routes and branches of said company," etc.

The proposed amendment stated "that the sole object of this application is to ascertain, in accordance with petitioner's charter, the compensation which is to be made to the mayor, etc., of the city of New York in relation to the construction and operation of its railroads in and over the streets and avenues of the city of New York which are included in the route and branches of said company * * * and that it does not seek to acquire any title in or to the land included within such streets or avenues or the interest of any persons or corporations therein, or any interest in real estate." The other amendments are in harmony with the proposed change shown above. The persons and corporations made parties as aforesaid objected to this charge for the reason that they might be injuriously affected thereby. The court directed the amendment to be made.

Elihu Root, S. B. Clark, Jos. S. Auerbach and J. T. Davies, for appls.

G. W. Wingate and John Clinton Gray, for resp't.

Held, No error. That the charge was not so fundamental or radical as to change the object or scope of the proceeding or add another subject matter to it. A prominent design disclosed by the original paragraph was to obtain the use of the streets and a determination of the compensation to be made for such use. The amendment or substitute emphasized that object by wholly restricting the design to the acquirement of these results from the city only. The order for that reason did not exceed the authority conferred by the act made applicable to this company and authorizing amendments in the proceeding. By that authority the court was invested with power to amend any defect or informality in any of the special proceedings authorized to obtain property, rights, interests or privileges required for the construction and operation of a railway. 2 R. S., 6th ed., 526, § 22.

The N. Y., W. S. RR. Co., 89 N. Y., 463, distinguished.

That the amendment discriminated unjustly against the parties opposing it, for in the adjustment of the compensation to be made to the city no order or decision can be made which will in any manner affect the rights or privileges of either of the persons or companies intending to oppose the proceedings. Before it can move in the construction of its road petitioner will be obliged to acquire all the rights and interests of adjacent or conflicting owners and to make such compensation to

them as they shall appear under the evidence to be entitled to receive. These rights and interests will remain wholly unaffected and undisturbed until petitioner shall institute some other proceeding, or extend that which is now pending, so far as to include the inquiry into those rights and privileges and the appraisal of the compensation to be made to the parties owning them, before they shall be deprived of them by the action of the petitioner.

The full scope and extent of the amendments are to present the case as one for the appointment of commissioners to determine the amount that shall be paid to the city for the use of its streets, so far as that use may be required and appropriated in the construction and operation of petitioner's railroad. And while the statute which has been made applicable to the proceedings of the company does not expressly provide for this sole pursuit through the instrumentality of the petition, it has not forbidden the power of the court to permit that course to be taken. The act under which petitioner was incorporated contemplates two important objects for which compensation shall be made, one for the real estate, property, rights, franchises and interests required by it in the construction and operation of its roads, or necessary depots, platforms, stairways, turnouts, switches, connections or approaches; and the other is the authority to construct and operate its railways along any street, avenue or public place in

the city of New York, and for which compensation is to be made alone to the city for such use and occupancy and the amount of which is to be determined in the same manner as damages to private property, § 5, and these several objects may as well be acquired under two petitions or separate proceedings as to be comprehended and included in one.

Order modified so as to declare that the proceedings shall in no manner prejudice or affect any other rights than those of the mayor, etc., in the streets intended to be used and that it shall not be assumed that any right or liberty to construct the railway shall be acquired against any or either of the other claimants or persons or companies interests in said streets, and as modified affirmed, without costs.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Brady, J.*, concur.

DIVORCE. PRACTICE.

N. Y. COURT OF APPEALS.

Blank, applt., v. Blank, respd.

Decided Oct. 11, 1887.

An action to set aside a judgment of nullity of marriage on the ground of fraud in contracting it cannot be maintained on the ground that plaintiff was fraudulently induced to refrain from defending it where the complaint or proofs do not deny the fraud charged in the former action or show that there was any defense on the facts.

This action was brought to set aside a judgment of the nullity of a marriage between plaintiff and defendant on the ground that the

present plaintiff who was the defendant therein, had been induced by defendant herein, by untrue statements as to the law of New York, to refrain from consulting counsel and from defending said action for nullity. Plaintiff did not in her complaint in this action nor by any offer of proof on the trial although to controvert any of the facts set up in the complaint in the action for nullity, nor to show that she had any defense to that action of which she had been deprived. Her charge of fraud consists simply of an allegation that the defendant, who is a lawyer represented to her that her marriage to him was void by the law of New York, and that she had incurred liability to a criminal prosecution for entering into it, and that she was by these representations induced to refrain from defending the action. The complaint was dismissed.

Samuel L. Gross, for applt.

George Zabriskie, for respt.

Held, That whether the marriage between defendant and plaintiff was legal as matter of law, the fraud by which she was charged of having induced defendant to enter into the contract was sufficient to justify the court in setting it aside, and that as she does not in any manner attempt to deny that she was guilty of the fraud charged, nor to show that she had any defense upon the facts to the action of nullity of which the defendant deprived her, the complaint was properly dismissed.

Also held, That the judgment obtained in the judgment for null-

ity could not be set up as a bar to this action.

It appeared that in the action for nullity after judgment by default had been taken against the present plaintiff she made a motion to have the default opened and to be let into answer. This motion was denied.

Held, That this did not constitute a bar to this action. 74 N. Y., 370; 41 id., 358.

Judgment of General Term, affirming judgment, dismissing complaint, affirmed.

Opinion by *Rapallo, J.* All concur.

POLICE. REMOVAL.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People ex rel. Thomas McBride v. Stephen H. French et al.

Decided Oct. 26, 1887.

Where an officer of previous good record while upon his post became exhausted by reason of weakness caused by prior injuries received in the discharge of duty and took a single drink of whiskey to keep up his strength, which caused intoxication, *Held*, That this single act could not, because of its unexpected results, be held to be conduct unbecoming an officer.

Certiorari to review dismissal of relator.

Relator was an officer of police of New York City and was removed by the board of police on a charge of conduct unbecoming an officer. The charge was predicated on a specification of intoxication while on post. It appears from the evidence contained in the return that relator was sick and weak from in-

juries which he had received during the discharge of his duty, and that while on his post he became exhausted and completely fagged out and took a single drink of whisky to keep himself on his feet. The fact of his weakened condition was confirmed by the testimony of the surgeon.

Turney & Halsey, for relator.

W. L. Turner, for respts.

Held, That the removal was erroneous. This single drink apparently had a more than ordinary effect in consequence of his weakened condition. Hence the apparent intoxication which was testified to by the witnesses. This single act cannot be held, because of its unexpected results, to have been conduct unbecoming an officer. In a case of this description the intent and purpose of the act must necessarily be strongly characterized by the previous record of the officer charged. It is not to be presumed that an officer of such a splendid record as relator in regard to life saving would deliberately falsify on a charge like that presented against him.

Proceedings reversed, and relator reinstated.

Opinion *per curiam*.

ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The Gutta Percha & Rubber Mfg. Co., *respt.*, v. the Mayor, etc., of Houston, *applt.*

Decided Oct., 26, 1887.

An attachment cannot issue in an action upon a judgment unless it affirmatively

appears that the judgment is upon contract, and even then it is doubtful whether it can issue where the judgment is the sole foundation of the indebtedness.

Appeal from order denying motion to vacate an attachment.

Action upon a judgment. The complaint and affidavit upon which the attachment was granted show the recovery of a judgment by plaintiff against defendant in a Texas court; but it was not stated in either upon what cause of action the judgment was recovered, or that it was on contract. The attachment, however, was issued on the judgment as a contract for the payment of the sum of money recovered by it.

Michael H. Cardozo, for applt.

Pelton & Poucher, for respt.

Held, Error. While in a general sense a judgment has been declared by the authorities to be a contract of record, it has not been so considered or construed as to create such a contract as the statute has referred to in providing for the issuing of attachments. By § 635, Code Civ. Pro., a warrant of attachment may be issued on a contract, express or implied, other than a contract to marry. This language, as it has been used in this section, the courts have been inclined to construe to include only contracts actually made between the parties, or to be implied from their dealings. It has not been extended to the class of obligations depending on contracts by matter of record. For a like reason it was held in *State of Louisiana v. Mayor*, 109 U. S., 285, that a judgment for a wrong was not such a

contract as was within that part of the Constitution of the United States declaring that no State should pass any law impairing the obligation of a contract. See also 50 N. Y., 176; 95 id., 428; 6 Civ. Pro., 79. Other authorities have been cited which have generally declared the law to be that a judgment is a contract, but it has not been held to be so within the provisions of a statute of this description, contemplating only the class of contracts arising out of the dealings or transactions of the parties themselves.

Taylor v. Root, 4 Keyes, 335, and Nazro v. McCalmont Oil Co., 32 Hun, 296, distinguished.

The case of Donnelly v. Corbett, 8 Seld., 500, was under the Revised Statutes before the change made by the enactment of the Code, which permitted the real and personal property of any debtor to be attached. That prescribed no form or description of contract as necessary to sustain the attachment, but all that it required was the existence of an indebtedness, and that indebtedness could very well arise upon a judgment.

As the authorities affect this subject, an attachment certainly cannot issue against the property of the debtor unless the fact affirmatively appears that the judgment is upon contract, and even then it is extremely doubtful whether courts as they construe statutes of this description have not required them to be so far limited as to exclude this remedy when a judgment shall be the sole foundation of the indebtedness.

Order reversed, but under this state of the authorities, without costs.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Bartlett, J.*, concur.

CRIMINAL LAW. JURISDICTION. PRACTICE.

N. Y. COURT OF APPEALS.

The People *respts.*, v. Bradner, *applt.*

Decided Oct. 4, 1887.

An order removing the indictment from the Oyer and Terminer to the Court of Sessions is essential to the jurisdiction of the latter court; but the bare fact that no order appears in the record does not show that one was not made, and in the absence of proof to the contrary its existence will be presumed.

Where the defendant pleaded not guilty, but subsequently withdrew the plea and moved to dismiss the indictment, which was denied, and the record showed no formal renewal of the plea, but the case was tried on that issue. *Held*, That it could be inferred all parties regarded the plea as withdrawn for the purposes of the motion only and as having been reinstated.

A motion for new trial on the ground of newly discovered evidence must be made before judgment, and it is not error for the court to deny a motion to vacate the judgment to enable such motion to be made.

The mere omission of the clerk in the entry of judgment to state the offense of which defendant was convicted will not render the sentence void; such defect is amendable.

Affirming S. C., 26 W. Dig., 545.

Defendant was indicted for the crime of grand larceny in obtaining from one N. \$1,500 by means of a check for that amount, which he induced L. to sign under false pretense that it was a check for

\$100. The trial was had in the Court of Sessions. The principal questions presented upon this appeal do not rise upon any ruling made on the trial, or in any proceedings subsequent to the trial, but are raised on the record alone and were in no way brought to the attention of the trial court.

Joseph W. Taylor, for applt.

George W. Daggett, for respt.

Held, That if the record discloses upon its face that the court had no jurisdiction or that the constitutional method of trial by jury was disregarded. 18 N. Y., 128, or some other defect in the proceedings which could not be waived or cured and it is fundamental, it would be the duty of an appellate tribunal to reverse the proceedings and conviction.

It was claimed that the Court of Sessions had no jurisdiction, because there was no order of the Oyer and Terminer remitting the indictment to that court for trial.

Held, That such an order was essential to such jurisdiction.

The record was silent as to whether such an order was made or not.

Held, That the bare fact that no order appears in the record does not show that one was not made; that it was not necessary that the existence of such an order should be affirmatively proved, and in the absence of proof to the contrary, its existence would be presumed, the Court of Sessions being a Superior Court. 1 Saund., 73; 1 Smith's L. C., 991.

The distinction between limita-

tion of jurisdiction and inferiority of jurisdiction pointed out.

It was claimed that defendant was not arraigned and did not plead to the indictment.

Held, That in a criminal case and arraignment and plea are necessary preliminaries to a legal trial. 4 Black's. Comm., 322; Bish. Cr. Proc., § 324; 3 Whart. Cr. Law, § 3154; Code Cr. Pro., §§ 296, 321, 313.

The record states that "defendant on arrignment pleaded not guilty" and "subsequently and after arraignment as aforesaid defendant by leave of the court withdrew his plea and moved the court to dismiss the indictment." Then follows the affidavits on which the motion to dismiss was made, and the decision of the court denying the motion. The record contains a statement of the proceedings and the evidence upon the trial and the finding by the jury of a verdict of guilty. It does not appear that there was a formal removal of the plea of not guilty, but the parties proceeded as upon the trial of that issue, the defendant being present with his counsel and taking part in the trial.

Held, That it is a just inference that all parties regarded the plea as having been withdrawn for the purpose of the motion only, and as having been reinstated when the motion was denied.

After judgment, defendant applied to the trial court to vacate the judgment to enable him to move for a new trial on the ground of newly discovered evidence.

The motion was denied.

Held, No error; that the motion should have been made before judgment. Code of Cr. Pro., §§ 463, 466.

In the entry of judgment the clerk omitted to state the offense for which the defendant was convicted as required by § 485 of the Code of Cr. Pro.

Held, That this did not render the defendant's sentence void; that the defect is amendable on this appeal, Code of Cr. Pro., §§ 542, 543, and the other parts of the record may be referred to for evidence of the fact omitted in the entry.

Judgment of General Term, affirming judgment of conviction, amended by inserting statement of the offense, and as amended, affirmed.

Opinion by *Andrews, J.* All concur.

CORPORATIONS. STOCK-HOLDERS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Mary A. P. Tucker, *respt.*, v. Cornelia Gilman, *applt.*

Decided June 18, 1887.

Neither a receiver appointed in a creditor's action, nor one claiming under him can enforce the liability of a stockholder of a corporation for the balance due on his stock under § 10 of the Manufacturing Act, or 1 R. S., 600, § 5.

Appeal from judgment in favor of plaintiff.

Action to recover of defendant, alleged to be a stockholder of the Kings Co. Mfg. Co., a sum neces-

sary to complete the amount of her shares of stock as fixed by the charter; it being alleged that the whole capital of the company had not been paid in and that the amount paid in was insufficient to satisfy claims of its creditors. One T. recovered judgment against the company and afterward became bankrupt; his assignees procured the appointment of a receiver of the company, who after collecting a certain amount of money was directed to distribute it and sell the remaining uncollected assets of the company. Pursuant to said direction the receiver sold the alleged claim to plaintiff and the sale was confirmed. Plaintiff thereupon brought this action to recover 60 per cent. on defendant's stock. Defendant denied the allegations of the complaint; alleged that she purchased the stock on the representation that it was full paid stock, and never subscribed for any, and that before the commencement of this action she transferred said stock in good faith. The court directed a verdict for plaintiff.

C. P. Crosby and *Henry E. Knox*, for *applt.*

Wheeler & Curtis and *E. P. Wheeler*, for *respt.*

Held, Error; that the action could not be maintained. That plaintiff as assignee of the receiver obtained no other or greater right than he possessed against defendant as purchaser or subscriber to the shares of stock mentioned. Upon looking at the order appointing the receiver it will be found

that he is appointed receiver of the property, estate, effects, choses in action, books of account and legal and equitable interests of said Kings Co. Mfg. Co. If the claim in question does not come under one or the other of the claims or interests specified in that order it is quite clear that plaintiff has no cause of action. In *Farnsworth v. Wood*, 91 N. Y., 308, which was an action brought by plaintiff as receiver of a manufacturing corporation organized under the General Manufacturing Act to enforce the liabilities imposed by § 10 of that Act upon stockholders in favor of creditors, it was held that the liability of the stockholder does not exist in favor of the corporation itself, or for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed conditions, and is to be enforced by these in their own right and for their own especial benefit. If it is sought to maintain this action because of the provisions of § 10 of the General Manufacturing Act, the case cited seems to us to be precisely in point, and it therefore follows that the learned justice erred in directing a verdict in favor of plaintiff.

If, however, it is claimed that the liability sought to be enforced arises because of the provisions of § 5, Tit. 3, Chap. 18, part 1 of the Revised Statutes, 1 R. S., 600, which section is applicable by reason of § 26 of the Manufacturing Act of 1848, which provided that all corporations formed under this act should be subject to the pro-

visions of Tit. 3, Chap. 18 of the Revised Statutes, which section reads as follows; "where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company," the reasoning of the case cited would be equally applicable. In the case of *Mann v. Pentz*, 3 N. Y., 415, the right of a receiver to enforce liabilities arising under § 5, above referred to, was the question involved, and it was distinctly held that a receiver could not maintain such an action.

It is, therefore, distinctly held that a receiver appointed in a creditor's action, as the receiver in this case was, cannot enforce liabilities under this section which requires the marshalling of obligations and claims in order that one stockholder may not be called upon to bear a greater burden than by the statute has been imposed upon him. The principle upon which the case rests is that a receiver in an ordinary creditor's suit has no power to enforce a liability under this section.

Judgment reversed, and new trial ordered, costs to appellant to abide event.

Opinion by *Lawrence, J.*; *Van Brunt, P.J.*; and *Bartlett, J.*, concur.

SCHOOLS. COSTS.

N. Y. COURT OF APPEALS.

The People *ex rel.* Wallace, *respt.*, v. Abbott et al., trustees, *appls.*

Decided Oct. 18, 1887.

A school district cannot be compelled to pay costs awarded against the trustees in an action which they defended without instruction of a district meeting, and where they made no application to the district to audit the claim or costs; such judgment binds the trustees individually and is not a charge on the district.

The relator brought an action against the trustees of School District No. 6, town of Gravesend, to recover the unpaid part of a year's salary, under an alleged contract of employment made between him and said trustees for that period. The trustees in their answer put in issue the alleged contract. The relator recovered a judgment for \$748.97 damages and costs, the costs constituting about one-half the amount. There was so far as it appears no direction or instruction of a district meeting, that the trustees should defend the action, nor has the district in any way assumed any liability for the costs embraced in the judgment, nor has any application been made by the trustees to the inhabitants of the district to have the costs or expense audited or allowed. The relator seeks to enforce by mandamus payment of the costs out of the funds of the district, in the hands of or under the control of the trustees.

T. C. Cronin, for *appls.*

Teunis G. Bergen, for *respt.*

Held, That the school district

cannot under the circumstances be compelled to pay the costs awarded against the trustees.

A judgment recovered against the trustees of a school district in their official character for the recovery of money, binds the trustees individually, Code Civ. Pro., §§ 1927, 1929, 1931, and will not constitute a charge against the district unless the action was brought or defended by the trustees by instruction of a district meeting, Laws 1865, Chap. 555, Tit. 13, §§ 6-11, or, where the action has brought or defended without instructions and a district meeting has refused to vote a tax in favor of the claim, and on appeal to the county judge from this refusal, it shall be decided that the account in whole or in part, ought justly to be charged on the district.

Order of General Term, affirming judgment for the relator, reversed, and proceeding dismissed.

Opinion by *Andrews, J.* All concur.

SURROGATE'S COURT. JURISDICTION.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

In re petition of Melinda Wheeler, for decree revoking letters of administration.

Decided Oct., 1887.

The Surrogate's Court has jurisdiction to entertain a motion made upon the petition of a creditor for the removal of an administrator under § 2685, Code Civ. Pro., and for the purposes of such motion determine the issue going to the relation of the petitioner as creditor.

Appeal by petitioner from order of Surrogate's Court of Niagara County, dismissing the petition upon the objections of the administrator to the effect, 1. That the surrogate had no power to determine that the petitioner was a creditor. 2. That it had no power to compel the administrator to embrace in the inventory property which he denied belongs to the estate of the decedent. 3. That no sufficient ground of revocation of the letters of administration is stated in the petition.

Henry M. Davis, for applt.

Daniel Millar, for respnt.

Held, That the last two grounds require no consideration further than to say that the proceeding is not taken to compel the inserting any property in the inventory, and that the allegations are such as to permit evidence in support of the relief had in view. Code of Civ. Pro., § 2685, subd. 2. This proceeding is instituted under the section last named, which enables a creditor to move for such relief; and for that purpose to render the provision effectual to support the proceeding the Surrogate's Court must have the power, of necessity, to determine the issue going to the relation of the petitioner as creditor, else a creditor would be powerless to protect the estate against the improvidence or misconduct of an administrator. The rule and its reason are well stated in *Lutz v. Forest*, 4 Denio, 346. The objection going to the jurisdiction founded upon the denial of the validity or legality of the claim of an alleged creditor is applicable

only to a proceeding having within its purpose the determination of a disputed claim between the creditor and the administrator, and is not extended to any other proceeding before the Surrogate's Court provided by statute. 102 N. Y., 157.

The proceeding was improperly dismissed.

Order reversed.

Opinion by *Bradley, J.*; *Smith, P. J.*, *Barker* and *Haight, J. J.*, concur.

ANIMALS. WARRANTY. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Duane Earl, respnt., v. *Geo. W. Lefler*.

Decided Oct., 1887.

Upon an issue as to the age of a horse, an impression of the horse's mouth, taken by a veterinary surgeon, may be competent as evidence.

The admission, in the Municipal Court of the city of Rochester, of incompetent testimony, to establish a fact clearly proved by other competent testimony, is not such error as requires the County Court to reverse the judgment on appeal.

Appeal from County Court judgment affirming judgment of the Municipal Court of the city of Rochester.

Action for alleged breach of warranty in a horse trade. The evidence tended to show that defendant warranted the horse, which he let plaintiff have, to be kind and sound in every respect and eight years old, but that in fact he was unsound, vicious and at least sixteen years old. Plaintiff recovered \$200 damages. One of the issues was as to the horse's age at

the time of the trade. Several witnesses testified as to the extent to which the appearance of a horse's teeth indicate his age. A veterinary surgeon, called by plaintiff, testified that he had taken an impression of the horse's mouth, and he produced it at the trial. It was received in evidence, against defendant's objection that it was incompetent and irrelevant.

George Bowen, for applt.

George W. Hall, for respt.

Held, That the objection was properly overruled. Such an impression made of a suitable substance may be classed, as a species of evidence, with diagrams, drawings and photographs. The objection was general, and was equivalent to saying that under no circumstances is an impression of that nature competent evidence. If the impression was taken at a time too remote, or was incorrect in any respect, defendant might have cross-examined the witness in those respects, but he did not, and cannot urge such objection now.

A witness called by plaintiff was permitted to answer a question which was improper, for the reason that it left the witness to determine what had been established by previous testimony, and it is impossible to ascertain, either from the question or the answer, upon what state of facts the answer was based. Testimony of the like faulty nature was received in some other instances. But there was other testimony in the case, entirely competent and proper, furnishing an ample basis for the amount

of damages recovered, so that if the objectionable evidence were eliminated from the case, the judgment would be well supported, and the County Court properly declined to reverse the judgment on account of the reception of the improper evidence referred to. Code, § 3063; Laws of 1877, Chap. 192, § 6; 5 Barb., 283; 12 id., 382; 13 id., 116; 3 Hun, 496.

Judgment affirmed.

Opinion by *Smith, P.J.*; *Bradley* and *Childs, JJ.*, concur.

SPECIFIC PERFORMANCE. EASEMENTS.

N. Y. SUPREME COURT. GENERAL
TERM. FIRST DEPT.

Edwin F. Raynor, *applt.*, v.
Dore Lyon, *respt.*

Decided Oct. 26, 1887.

The owner of a block of land sold the same in lots to different purchasers, the deeds containing covenants against the erection of nuisances thereon. *Held*, That the covenants were for the benefits of the other purchasers and constituted easements in their favor, and therefore were incumbrances.

Appeal from judgment dismissing complaint.

Action for specific performance of a contract for the sale of two lots of land. By the contract plaintiff was bound to deliver a deed free from all incumbrances. Defense, that the deed tendered did not convey the premises described free from all incumbrances.

It appeared that one J. was, in 1852, the owner of the block on which the lots in question are;

that he laid out the block in lots and conveyed them to different purchasers; that in each of the deeds was a covenant or condition against nuisances or other offensive erections on the lot sold. In 1869 they were reconveyed to J., who then conveyed them to one B. "subject to covenant nuisances as described" in the former deed. The same covenant was in the deed from B. to S., who gave back a mortgage which did not contain this covenant, and on foreclosure plaintiff obtained title. With the deed in this case a release executed by J. was also tendered. The court held that the lots were still subject to this restriction on their use, and dismissed the complaint.

James M. Fisk, for applt.

Frederick H. Man, for respt.

Held, No error. While the covenant or agreement was made with the grantor it was manifestly for the benefit of whoever should become the owners of the other portions of the block. They had the right to purchase as they did, upon the understanding that neither of the lots conveyed could be used or devoted to either of these prohibited objects. So much of the deeds relating to these subjects was for the benefit of each of the other purchasers. And they had the right to insist upon the observance of these restrictions in the conveyance by J., as these restraints were for their benefit as purchasers of the property. Deeds to property made substantially in this manner have been required to be observed in favor of the purchasers taking

title in reliance on the fact of such observance. 3 Paige, 254; 8 id., 351; 47 N. Y., 73; 23 Eng. L. & Eq., 584; 9 Sim., 196; 15 id., 377; 2 Phil., 775; 23 Barb., 153; 38 N. Y., 165, and 70 id., 440, where it was said that "An easement in favor of and for the benefit of lands owned by third persons can be controlled by grant, and a covenant by the owner, on good consideration, to use, or to refrain from using, his premises in a particular manner, for the benefit of premises owned by the covenantor, is in effect the grant of an easement, and the right to the enjoyment of it will pass as appurtenant to the premises in respect of which it was created. Reciprocal easements of this character may be created upon the division and conveyances in severalty to different grantees of an entire tract, and they may be created by a reservation in a conveyance, by a condition annexed to the grant, or by a covenant, and even a parol agreement of the grantee." See also 72 N. Y., 174; 49 Penn., 289; 32 Md., 487.

That the reference in the deed from J. to B. shows the purpose of the parties to subject the deed to the covenant or reservation in the original deed.

Also held, That the fact that the mortgage given to B. did not refer to this reservation and the title was obtained on a foreclosure of such mortgage did not change or modify the obligation to which the premises had been subjected. The deeds containing the reservations as a part of the second title

could not be changed or materially affected by the execution and delivery of the mortgage in the form in which it was made and its foreclosure.

Neither was it in the power of J. to release the property from the effect of these restraints by the release executed by him in 1886. He at that time had no interest in either of the lots or any part of the block. And as these reservations, restrictions or covenants were made for the benefit of the property, and inured in favor of the persons who became the respective owners of it, he could not discharge any part of it from these restrictions. And as that, under the case in 38 N. Y., 165, created an incumbrance on the lots which defendant agreed to purchase from plaintiff, he was not in a condition to perform the agreement which had been made by him, and defendant was not obliged to accept or receive the title which was offered him.

The court in dismissing the complaint awarded judgment for defendant for the amount paid by him on the contract, and also for counsel fees and disbursements in the examination of the title.

Held, No error. That as plaintiff had bound himself to convey free from all incumbrances, which he was incapable of doing, defendant was entitled by way of indemnity to recover the expenses incurred in ascertaining that fact.

Dey v. Nason, 100 N. Y., 166, distinguished.

Judgment affirmed, with costs.

Opinion by *Daniels, J.*; *Van*

Brunt, P.J., and *Brady, J.*, concur.

WILLS. TESTAMENTARY CAPACITY.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

In re probate will of Francis W. Tracy, deceased.

Decided Oct., 1887.

The fact that the provision made by will for testator's daughter is much less than she would have received in case of intestacy is not of itself evidence that testator lacked testamentary capacity.

To invalidate a will on account of his habits of intoxication and their effect on his faculties, it must appear that at the time of its execution testator was so enfeebled in mind by the use of intoxicants, or was then so intoxicated, as to be incapable of making a will.

A mistake as to facts will not constitute a delusion which will invalidate a will; to have that effect it must be an insane delusion as defined in the law.

Appeal from decree of surrogate of Erie County admitting to probate certain instruments pro-pounded as the last will and testament of decedent, and four codicils thereto.

The opposition to probate in the Surrogate's Court was put on the ground that the papers pro-pounded were the product of a disordered and diseased mental condition which rendered the testator incapable of making a will, his mind and moral sense having become impaired and enfeebled, and he having become subject to delusions in consequence of the excessive and continued use of alcoholic drinks. That testator was addicted for years to the excessive

use of intoxicating drinks, induced in great part by diabetes with which he was afflicted, is an unquestioned fact. The evidence on this point is not given in detail. The testimony respecting the alleged delusions is substantially as follows: During the year or two succeeding the divorce which was procured in May, 1871, between testator and contestant's mother, contestant Harriet being their only child, Mr. Tracy availed himself of the provision contained in the decree permitting him to have interviews with his daughter at all proper times. She then resided with her mother in or near New York, and was five or six years old. The interviews were at a hotel in New York, and the child was accompanied by her nurse, who was present at the several interviews. Mr. Tracy is shown to have said in substance on several occasions, referring to those interviews, that the servant told him he could not see his daughter alone; that such were her orders. One witness, Mrs. Reed, testified that on an occasion in the winter of 1884-5, when witness breakfasted with Tracy, he told her that there was a detective with the nurse and child; that he saw the detective when he went to the door. Margaret Dooley testified that she was the nurse who went with the child; that she never told Tracy he was not to see his daughter except in her presence, and was never requested to do so; and that no detective ever accompanied her. In the summer of 1885 Mrs. Tracy, testator's mother, sent

Harriet a watch as a gift. At that time testator was in Europe and knew nothing of the matter until he returned. There is evidence tending to show that testator subsequently had the notion that the watch was returned, and that the grandmother received a letter from an attorney in New York to the effect that she must not attempt any further correspondence with her grandchild except through him. It was shown that the watch was not returned, but whether the letter referred to was, or was not, received or written, does not appear. In these respects, and also in believing that Harriet's mother wished any portion of his property, if he did so believe, it is contended by appellant's counsel that testator was under a delusion which influenced the provisions of his will in respect to Harriet, and that in consequence of such delusion probate should have been denied.

James M. Humphrey, special guardian of Harriet F. R. Tracy, applt.

John E. Parsons and *W. F. Cogswell* and *Chas. Robinson Smith*, of counsel.

Sherman S. Rogers and *John G. Milburn*, for proponents.

Held, A careful examination of the testimony supports the conviction that the testamentary provision made by the deceased for his daughter, the contestant, although so small in comparison with the amount of his estate, or even with the portion of it which she would have been entitled to if he had died intestate, as that un-

der ordinary circumstances it would have seemed harsh and unjust, not to say unnatural, toward her, was nevertheless the expression of his will, founded upon reasons which seemed to him good when his mind was active and he was in all respects capable of disposing of his estate. It is clear that his action in respect to his daughter was largely influenced by a determination on his part to dispose of his estate in such a way, if possible, as that, while her needful wants should be provided for, no portion of his property should in any event be enjoyed or controlled by Harriet's mother. He bequeathed to Harriet the income of \$100,000, which he evidently thought would be sufficient with her other means to supply her wants. The fact that the provision made by him is much less than she would have received in case of his intestacy, however unreasonable or unjust it may seem, is not, of itself, evidence that he lacked testamentary capacity. 30 Barb., 131; 3 Redf., 381.

Proof of testator's habit and the fact of its tendency are not enough for contestant's case. In order to invalidate the will, therefore, it must appear that at the time of its execution testator was so enfeebled in mind by his habitual use of intoxicants, or was then so intoxicated, as to be incapable of making a will. At this point contestant fails.

That testator was under a mistake as to the enforced presence of the servant, the employment of a detective, the return of the watch,

the attorney's letter, and the wishes of Harriet's mother respecting his property, may be true, but it by no means follows that he was under what the law terms a delusion in those respects which will invalidate his will. A delusion to have that effect must be an insane delusion, and the case is barren of evidence as defined in the law. Busw. Insan., § 13; 3 Redf., 220; 33 N. Y., 619; Add. Ecc., 79; 54 Barb., 374; 16 id., 259. In regard to the interviews at the hotel, the nurse was in fact present. Whether her version of what occurred there accorded with his understanding of the matter can never be known. As to the detective, testator may have seen one, or a person whom he took to be one, at the door, as he said, when he went there with the child and nurse. If he did, it was hardly irrational or insane, under the then existing state of affairs between him and Harriet's mother, for him to infer that the detective was purposely placed there. Of the watch transaction he had no personal knowledge. It occurred when he was out of the country. His information about it apparently came from his mother, and from her, probably, he got his idea respecting the attorney's letter and its contents. There is no evidence that such a letter was not received. And there is no proof that he was ever told that the watch was not returned; in other words, that he showed himself incapable of being reasoned out of his belief on that subject.

The second codicil contains a provision revoking the provisions in the will and codicils in favor of any beneficiary who shall, in person or by another, contest the probate of the will, or either of the codicils. The surrogate in his decree stated that the probate of the will was contested. Contestant's counsel apply to have that statement stricken out, probably in apprehension that the statement may have a bearing upon the rights or liabilities of the parties or some of them under the revoking clause above referred to. Whether it has or not, is a question not properly before us. We merely decide that the statement is proper, as a matter of procedure. Laws of 1877, Chap. 206, § 2; Throop's note to § 2623 of the Code, and that the surrogate was right in holding that there was a contest within the meaning and for the purpose of the section cited.

Decree affirmed, with costs of appeal to the executors, to be paid out of the estate.

Opinion by *Smith, P.J.*; *Barker, Bradley* and *Childs, JJ.*, concur.

PLEADING. ADMISSIONS. EVIDENCE.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

John A. Getty, *applt.*, v. The Town of Hamlin and the Town of Kendall, *respts.*

Decided Oct., 1887.

Allegations in the complaint which have been admitted in the answer cannot be contradicted by evidence, and a judgment contrary to such admissions will be set aside.

Appeal from judgment on nonsuit at Circuit and from order denying new trial.

Action for injuries received by plaintiff by being thrown from his wagon while driving upon a defective approach to a bridge on a highway running north and south between the towns of Hamlin and Kendall, known as the town line road. The highway is intersected by a stream over which the bridge is erected, forming part of the highway. The theory of the action is that the two defendant towns are jointly liable for the construction and maintenance of the bridge and its approaches, and that by the negligence of said towns and their respective commissioners of highways, the said approaches were suffered to be out of repair, whereby the injuries complained of were caused. The complaint alleged that said towns are divided or separated by a public highway, commonly known as the county line road; that across said highway is a creek; that over said creek is a bridge for passage by those traveling upon said highway; and that said bridge had been constructed and maintained for a number of years last past, across said creek in said highway, by said towns. Those allegations were admitted by defendants' answer. At the trial, when plaintiff rested, a nonsuit was granted as to the town of Kendall, on the grounds that there was no proof that the commissioner of that town had funds with which to repair, and that it appeared in evidence that, owing to a deflection

in the line of the highway at or near the point where the bridge was built, the bridge was wholly in the town of Hamlin. After the nonsuit as to the town of Kendall, the defense gave evidence tending to show that although the bridge was solely in Hamlin, that part of the road in which it was situated had been allotted to Kendall under 1 R. S., 517, § 75, to keep the same in repair, and on that ground a nonsuit was granted as to Hamlin.

J. D. Decker, for applt.

J. M. Davy, for respts.

Held, Error. Plaintiff, after having made a case which would have authorized the jury to find that the injuries which he had sustained resulted from defects in the approaches to the bridge, without negligence on his part, was turned out of court, not upon the ground that no liability was shown on the part of defendants or either of them, but first, upon the motion of Kendall, on the ground that Hamlin was exclusively liable, and next upon the motion of Hamlin, on the ground that Kendall alone was liable. This resulted from the erroneous admission of evidence offered by defendants in contradiction of their admissions in the pleadings. From the facts so admitted, not only the liability of the two towns to repair resulted as a legal conclusion, 1 R. S., 701, § 1; Laws of 1841, Chap. 225, § 1, as amd.; Laws of 1857, Chap. 383, § 1; 55 N. Y., 472; 94 id., 153, but it also appeared conclusively that they had recognized such liability and acted upon it for several years. See Code, § 522; 6

Bosw., 312; 4 Barb., 265; 38 N. Y., 28; 5 Sandf., 210.

The lack of funds for repairs by the commissioner of Kendall, if it existed, was matter of defense. 49 Hun, 190, and cases cited by Bradley, J.

Judgment and order reversed and new trial granted, costs to abide event.

Opinion by *Smith, P.J.*; *Haight* and *Bradley, JJ.*, concur.

NEGOTIABLE PAPER. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

George F. Vietor et al., *respts.*,
v. Moritz Bauer et al., *appls.*

Decided Oct. 26, 1887.

Where a note is made and indorsed to be used by another to obtain money on it for the maker, or in case of failure to do so to be returned to the maker, and the person to whom it was delivered for that purpose without consideration delivers it to others in payment of his own debt, such act constitutes a fraudulent diversion of the note.

Where the sole consideration for a transfer of a note fraudulently diverted is a credit of the same on an antecedent debt of the transferer the maker and indorser may relieve themselves from liability by showing the facts of such diversion, and it is error to exclude proof of such facts.

Appeal from judgment on verdict directed by the court.

Action on a note for \$2,500 made and indorsed by defendants. Plaintiffs received the note from one L., to whom it had been first delivered. Defense, that the note was made without consideration; that it was never delivered by defendants, and that they had been

criminally defrauded and deprived of it by the acts of L. The answer also denied that plaintiffs were the parties in interest.

It appeared from plaintiffs' evidence that L. was indebted to them in a large amount and that the note when received was credited on said debt, which was the consideration on which they received it.

Defendants offered to prove that the note had been made and delivered to L. under an agreement that he should obtain and return the money for it, or return the note itself. The evidence as to these facts was objected to as immaterial and incompetent, and was excluded.

Jos. N. Goldbacher, for appls.

James Dunne, for respts.

Held, Error. That if the objection had been made at the trial that the answer was not sufficient to permit proof of the defense. Defendant offered to prove it might have been made so by the allowance of an amendment adding a statement of this alleged diversion of the note. The court had power at the trial to allow this amendment, for it may now permit an additional allegation by way of pleading to be there made. Code, § 723. And where an objection may in that way be removed it cannot be effectually first taken on appeal. The defective condition of the answer formed no reason at the trial for the exclusion of this defense. But it was excluded because the evidence was considered to be incompetent and immaterial.

That defendants were not precluded from making this defense to the note by the credit of it as a payment on the account plaintiffs had against L. is quite well established by the authorities. By that credit they neither parted with any value nor surrendered anything whatever on the faith of it. If they had, they would stand in a very different legal position, requiring the exclusion of this defense. But if they shall be deprived of this credit by the proof of this defense their account will stand as it did before—as a legal demand against their debtor L. Their right to enforce and collect it will be in no manner affected by the fact of this credit, and its effacement through proof of the fact that L. had no authority to use the note for that object. And where that is the condition of the holders of commercial paper fraudulently diverted from the purpose for which it has been made and indorsed, there the maker and indorser may relieve themselves from liability upon it by proof of such fact as was proposed to be shown in this instance. 36 N. Y., 128; 81 id., 218; 7 Hun, 279; 69 N. Y., 502; 65 id., 438.

If this note was made and indorsed to be used by L. only by obtaining the money upon it, or if he failed to do that then to be returned by him to the maker, and it was without consideration in fact, he had no legal authority to deliver it to plaintiffs in part payment of his indebtedness to them. That would be a fraudulent diversion of it from the object for

which it was made and indorsed. And defendants were entitled, as no objection was taken to the answer, to prove these facts as their defense.

Judgment reversed and new trial granted, costs to abide event.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Bartlett, J.*, concur.

REMOVAL. SERVICE. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

John F. McCoy, *respt.*, v. The Mayor, etc., of N. Y., *applt.*

Decided Oct. 26, 1887.

In an action for salary where due mailing of a notice of removal is shown, but plaintiff testifies that such notice never reached him, an issue is presented for the jury, and it is error to direct a verdict for plaintiff.

Appeal from judgment in favor of plaintiff, entered on verdict directed by the court.

Action to recover salary as excise inspector. It appeared that plaintiff, who was an excise inspector in the city of New York, was, on Dec. 16, 1880, notified by the board of excise that he was suspended without pay, and after that date they refused to accept any service from him, although he was ready and willing to perform his duties, or to give him any voucher or draft for his salary, although there were funds sufficient to pay his claim. It also appeared that the commissioners of excise on Jan. 18, 1881, passed a resolution declaring that all persons suspended from duty and

pay on Dec. 15, 1880, were thereby removed, the removal to take effect from the date of suspension. The resolution was put in evidence, and proof was given that notice thereof was sent to plaintiff by enclosing it in a postpaid envelope addressed to him at his residence and depositing it in a lamp post mail box. Plaintiff denied that he ever received the notice.

Defendant's counsel asked that the case be submitted to the jury with direction to find a verdict for salary between Dec. 15, 1880, and Jan. 18, 1881, if they believed plaintiff received the notice. This was denied and the court directed a verdict for plaintiff for the full amount claimed, viz., to June 18, 1882.

David J. Dean, for *applt.*

Elliott Sanford, for *respt.*

Held, Error. That defendant should have been allowed to go to the jury on the question whether plaintiff received notice of the resolution of removal. Proof of the mailing of the notice properly addressed and postpaid raised a presumption that it was received by the person to whom it was directed. 69 N. Y., 571; 111 U. S., 185. When such proof of mailing was met by the testimony of plaintiff that the notice had never reached him, it was for the jury to pass on the issue of fact thus raised. 105 Mass., 391. The denial by plaintiff should not have been accepted as conclusive.

Also held, That the court below properly denied the city the right claimed to open and close. The answer did not admit all the ma-

terial allegations of the complaint. The averment that plaintiff had been ready and willing at all times to perform the duties of his position was material to a statement of his cause of action and was controverted by the second subdivision of the answer.

Judgment reversed and new trial granted, with costs to abide event.

Opinion by *Bartlett, J.*; *Van Brunt, P.J.*, and *Daniels, J.*, concur.

ANNUITY. APPORTIONMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Alfarata Reed, admrx., v. Augustus Cruikshank, trustee.

Decided Oct. 26, 1887.

Where no date or period is fixed for the payment of an annuity it may be apportioned, and where the annuitant dies before the expiration of the year his personal representative is entitled to a proportionate part of said annuity.

Submission of controversy without action.

Claim for the payment of so much of an annuity as had accrued at the death of plaintiff's intestate. By the will of one L. his entire estate was devised to his executors to receive the rents and income thereof, and to pay the net income from one house to one V., who died before said L. In the will, then, the payment out of the residue of the net income of the estate to R., plaintiff's intestate, of "the sum of \$2,000 a year during her natural life." The annuity was paid to her until July

5, 1885, and she died June 7, 1886. Plaintiff claims from defendant, the trustee under the will of L., the payment of so much of the annuity as had accrued up to her death of his intestate. The application is defended under the authorities holding that an annuity payable at a specified time is not apportionable. 71 Ind., 526; 6 Met., 194; 2 Com., 659; 13 Hun, 147.

John Graham, for plff.

Edward Van Ness, for deft.

Held, That the defense is untenable. These decisions proceed on the construction that where the annuity is dependent on such a direction no right to the payment of the money accrues before the arrival of the period or day designated for payment. Where no such day or period has been mentioned neither these authorities nor the rule maintained by them can be applicable. And it would seem to follow from that circumstance that the annuity not only may, but should be apportioned where no time for payment has been mentioned, for there the right of the annuitant to payment depends upon no particular day, but accrues continuously, and perhaps it might not be too much to say from day to day. The only circumstance on which its payment depended in this case was that it should be out of the net income of the testator's estate, and that income from its situation and condition was continually accruing, and as it accrued the annuitant became entitled to her money. It is true, she had been in the habit

of receiving it at the expiration of each year from the time of the decease of testator. But the will contained nothing postponing her right to it to that time. Neither did it direct that it should be paid to her in bulk, but the direction was that she should receive the \$2,000 a year during her natural life out of the net income of the estate, and as that net income would accrue she would appear in like manner to be from time to time entitled to its payment.

Chapter 542, Laws of 1875, making annuities afterward granted apportionable evidently proceeded upon this understanding of the law, for it has been made applicable only to annuities, dividends and other payments becoming due at fixed periods. And it could not have been the intention of the law to make such annuities apportionable, while those not becoming due at any fixed period should be left unapportionable. The inference from the act is that those other annuities were understood to be apportionable without the aid of the act and that it was those accruing at fixed periods which required the interposition of the legislature to make them also apportionable and in that way create a uniform rule applicable to all cases, and to carry that intent into effect this statute was enacted.

The fourth subdivision of testator's will, as well as the one preceding it, also tends to maintain this construction, for that directs that the residue and remainder of

his estate not previously disposed of should be divided among the persons mentioned therein. And as this annuity was previously disposed of it could not have been intended to be included within this subdivision.

It may be presumed from the usual or common divisions of rental into quarterly payments that the rent of the store No. 423 Broadway was paid in this manner, although the fact has not been stated in the case. That store yielded an annual rent of \$4,750, and out of its rental this income might very well have been, as it probably was, payable. And that would secure to the annuitant even if the annuity did not accrue from day to day, the right to call for payment at least at the expiration of every three months. Either herself or the executor required to consider in making the payment was the condition and income of the estate, and that would be reasonably conformed to by requiring the payments to be made in this manner. Both the justice of the case and the probate intent of testator in providing for this annuity well support the determination that payment should have been made in this manner and that plaintiff, as administratrix of the annuitant, is entitled to recover three-fourths of the annuity, with interest from the time the last quarterly payment could have been demanded.

Judgment accordingly.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, concurs.

HABEAS CORPUS. CONTEMPT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People ex rel. Marvin R. Clark, *applt.*, v. Hugh J. Grant, sheriff, et al., *respts.*

Decided Oct. 26, 1887.

Relator was imprisoned for contempt for nonpayment of alimony. He had been held under previous commitments for the same offense, applications to discharge from which were denied, and new commitments issued to correct irregularities. *Held*, That he was not entitled to a discharge under § 2050.

Where an order in contempt proceedings indicates precisely the moneys to be paid to obtain a discharge an omission to specify mention a formal fine will not entitle the party in contempt to a discharge.

A party in contempt for nonpayment of alimony is not subject to imprisonment for nonpayment of the referee's fees, but he is not entitled to discharge because they have been included in the amount directed to be paid.

Appeal from order dismissing writ of *habeas corpus*.

Relator is in custody for nonpayment of alimony, counsel fees and referee's fee. He was arrested under a commitment of the Court of Common Pleas dated Dec. 23, 1886, on which he was detained in custody eighteen days, when a more formal order was issued on which he was held twenty-two days, when the commitment on which he is now held was issued. The demurrer to the return shows that he was never discharged from the former orders, but he obtained writs of *habeas corpus*, on which in each instance his applications for discharge were denied and the sub-

sequent commitments issued to correct irregularities in the former ones.

Edward P. Wilder, for *applt.*

Wakeman & Latting, for *respts.*

Held, That he was not entitled to a discharge under § 2050 of the Code, declaring that a person shall not be again imprisoned, restrained or kept in custody for the same cause after he has been discharged by a final order made upon a writ of *habeas corpus* or *certiorari*. He has neither been discharged in fact nor by virtue of either of these writs, but in each case the application for his discharge under the first or second commitment has been denied. A further reason would prevent his present discharge, if he had been formally relieved from custody under the first or second commitments. For by subd. 3 of the same section a person discharged for any illegality in the final order, judgment or other mandate is not entitled afterward to be discharged when he has been again imprisoned by virtue of a lawful judgment or other mandate for the same cause of action.

It is claimed that the last commitment is irregular because it omits to state that notice of the applications for the orders of April 12 and 14, 1887, were given to relator.

Held, Untenable, as those orders were entered to supply defects in the preceding orders by which he was adjudged in contempt, and those orders were made after hearing relator's counsel, and are mentioned in the last commitment.

In this manner whatever defects may have existed in consequence of the imperfect recitals or statements of the preceding orders have been corrected, and relator's imprisonment and detention legalized, if it was not previously so, by means of such corrections.

It is also objected that the affidavit or proof recited in them was not served on relator.

Held, Untenable. That § 2274 refers to the affidavit on which a warrant of attachment may be issued to bring the defendant before the court to answer for his alleged contempt. This was not a proceeding of that description, but all that the affidavit or proof was relied upon to establish was that relator had failed to comply with the order directing the payment of these several sums of money; and neither the service of such affidavit or proof of notice of the application was required to be made or given to relator. But the court was at liberty to dispense with it under the authority of § 2268 of the Code.

Also held, That while the orders may be defective because no formal fine is mentioned, they are not substantially so, for they do prescribe the amounts to be paid by relator to relieve himself from imprisonment. This informality might be serviceable to him in support of an appeal from the orders themselves, but it cannot be by way of sustaining his application for his discharge in this collateral proceeding, as long as the orders indicate precisely the moneys he is to pay, and in that

manner substantially present the elements of the fine required to be imposed upon him.

Also held, That relator is not subject to imprisonment for non-payment of the referee's fees. What the law has provided for is his punishment in this manner for his default, refusal or neglect to pay the alimony and counsel fees allowed and directed to be paid by these orders. No provision of the Code sanctions the insertion of the referee's fees in the order as a foundation for relator's imprisonment. But he is not entitled to be discharged from imprisonment because this particular direction has not been authorized. Before he can secure his discharge on that ground he must pay the other sums which he has been legally directed to pay and adjudged in contempt for not paying. 5 Hun, 428; 66 N. Y., 8.

Order affirmed.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Brady, J.*, concur.

LEASE. LIEN.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The New York Dyeing & Printing Establishment, *respl.*, v. Jane A. De Westenberg et al., *applts.*

Decided Oct. 26, 1887.

In the absence of a specific provision in a lease to that effect, an agreement therein contained to pay the value of the buildings and improvements at the end of the term merely renders the lessors liable to a money judgment therefor, and creates no lien on the land.

Appeal from judgment in favor of plaintiff.

Action to recover the value of buildings and improvements on leased land placed thereon by M., plaintiff's assignor.

Defendants' ancestor died, leaving a will by which he devised to his executors all his estate in trust to collect the rents, issues and profits, transact, manage and control the estate, "according to their discretion and good judgment, and to let, lease and hire out my houses and stores for the most money which can be had and gotten for the same, for any term of time they may think proper and beneficial." January 10, 1860, the executors made a lease of the premises in question to one M., for twenty-one years for \$4,000 a year, with a covenant to pay, at the expiration of the term, the value of all buildings and improvements made by the party of the second part, not exceeding \$20,000. M. tore down the building on the premises and erected a new one shown to be worth \$23,890. The lease was afterward assigned to plaintiff and it has been in possession ever since the lease was first given, M. being its president, and the rent has been collected since the death of the last executor in 1864 by the husband of one of the defendants, who are the owners of the land.

The answer denied that plaintiff was a corporation; set up that the trustees exceeded their power in making the lease, and that allowing the tearing down of the old building was waste.

The court below held that testator having given the absolute estate in fee to his executors and trustees intended to give them the same power during the continuation of the trust as he could himself have exercised in the matter of leasing or improving the estate, and that those who were entitled to the remainder took their estate subject to the exercise of such power by the trustees, see 19 Barb., 608; 17 N. Y., 491; that the change in the building was not waste, as it converted premises which were worth \$1,500 a year to property producing \$4,000, 3 Paige, 262; that defendants being of full age in 1864, and the husband of one having collected rent under the lease from plaintiff since that time, nearly seventeen years, defendants are estopped from questioning the power of the trustees to make the lease or the existence of the corporation. 3 Sandf., 162; 1 id., 108; 22 How., 334; 25 Barb., 305; 15 Abb., 68; 22 Alb. L. J., 134. He thereupon rendered judgment for plaintiff for \$20,000 and interest and that plaintiff had a lien on the land therefor, and for a sale of the land for its payment.

A. J. Vanderpoel, for applts.

Joseph H. Choate, for resp't.

BARTLETT, J.—For the reasons given and upon the authorities cited in the opinion of the court below we are satisfied that plaintiff was entitled to recover the value of the building and improvements which its assignor put upon the land of defendants. The decree goes too far, however, in ad-

judging that plaintiff has a lien on the premises for this amount. The lease does not provide for any lien and in the absence of some specific provision in that instrument on the subject the effect of the agreement therein contained to pay the value of the buildings and improvements at the expiration of the term is merely to render the lessors or their successors in interest liable to a simple money judgment for the amount at which such value shall be assessed. Under the circumstances we do not think the court possessed the power to direct a sale of this particular property as in a mortgage foreclosure suit on the theory that there was a specific lien which should thus be enforced.

Judgment modified by omitting those portions which declare a lien to exist and order a sale of the premises.

Daniels and Brady, JJ., concur.

DIVORCE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Florence M. Demeli v. Henry A. Demeli.

Decided Oct. 26, 1887.

In an action for separation on the ground, among others, that defendant accused plaintiff of adultery without probable cause, plaintiff may testify as to her innocence, although the answer charges such adultery and asks for absolute divorce.

Under Chap. 103, Laws of 1887, a husband or wife may now testify against the other to disprove an alleged adultery.

Cross appeals from judgment in action for separation.

Plaintiff brought this action for a separation on the ground, among others, that defendant had charged her with adultery without any justification or reasonable cause for such accusation. Defendant set up such adultery as a counterclaim for absolute divorce. On the trial plaintiff was allowed to testify to her innocence of the adultery charged. The court refused a separation and dismissed the counterclaim.

John E. Parsons, for plff.

David McClure, for deft.

Held, After deciding that the judgment was right on the merits, that the objection to the admission of plaintiff's testimony was untenable; that it is plain that she was permitted to so testify not because an issue of adultery was presented by the counterclaim and reply, but because her demand for a separation from her husband was based in part on the averment in the complaint that he had charged her with adultery without any justification, or reasonable or probable cause for the accusation. To show that it was unjustifiable it was essential to show that the charge was false, and the testimony under consideration was held to be proper for that purpose.

But even if this was error, a change has been made in the law since the cause was tried which renders the error unimportant. Section 831, Code Civ. Pro., has been amended so as to permit a husband or wife to testify against

the other on the trial of an action founded on an allegation of adultery, not only to prove the marriage, but also to disprove the alleged adultery. Laws of 1887, Chap. 103. Upon a new trial, therefore, if one were ordered because plaintiff has thus been allowed to testify, the court would be obliged to receive the same testimony from the same witness. Under these circumstances, even if the objection was well taken, it would be a useless formality to reverse the judgment on this ground.

Judgment affirmed, with costs.

Opinion by *Bartlett, J.*; *Van Brunt, P.J.*, and *Macomber, J.*, concur.

APPEAL.

N. Y. COURT OF APPEALS.

King et al. v. Barnes et al.

Decided Oct. 25, 1887.

An appeal will not lie to the Court of Appeals from a judgment of General Term modifying in other respects an interlocutory judgment ordering an accounting.

The granting of amendments to the complaint not substantially changing the claim rests in the discretion of the court, and an order of General Term allowing them is not appealable to the Court of Appeals.

So also as to a stay pending an appeal.

This was a motion to dismiss an appeal. It appeared that an interlocutory judgment was entered at Special Term in the above entitled action in favor of the plaintiffs; that said judgment finally determined some of the matters in controversy between the parties, but

ordered an accounting and appointed a referee for that purpose. The defendant B. appealed to the General Term, and moved for a new trial. The motion was denied and the judgment modified, but not as respected the accounting. From this last judgment the defendants appealed to this court.

Noah Davis, for appls.

W. W. MacFarland, for respts.

Held, That the appeal should be dismissed, the judgment appealed from being an interlocutory judgment and not final.

At the trial plaintiffs moved to amend their complaint by inserting certain additional allegations. The motion was denied and upon appeal to the General Term the amendments were allowed. They did not substantially change plaintiff's claim. Defendants appealed from the order of the General Term.

Held, That it was within the discretion of the court to grant the amendments under § 723 of the Code, and that the order of the General Term is not appealable to this court.

Certain of defendants moved that plaintiff's proceedings upon the judgment be stayed until the hearing and decision of their appeal to this court. From that order the plaintiffs appealed to the General Term and there the order was reversed. The defendants appeal from the order of reversal.

Held, That as the order rested in the discretion of the General Term it was not reviewable.

Appeal dismissed.

Opinion by *Earl, J.* All concur.

FORECLOSURE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Pauline Geissman, *respt.*, v. Lob Wolf et al., and Francis C. Cormier et al., *appls.*

Decided Oct. 26, 1887.

A judgment creditor derives title through his debtor within the meaning of § 829, and cannot in an action to foreclose a mortgage on the debtor's lands show by him personal transactions between him and the mortgagee, since deceased, to prove the mortgage fraudulent.

Where the answer admits the making and recording of the bond and mortgage, but denies delivery, proof that the mortgage was recorded is sufficient to show delivery; production of the bond is not essential.

Appeal from judgment of foreclosure.

Action to foreclose a mortgage made by defendant Wolf to one H., now deceased. Wolf was executor of H.'s will and assigned the mortgage to plaintiff. Appellant Cormier is a judgment creditor of Wolf subsequent to the mortgage. He claimed that the mortgage was fraudulent in inception and without consideration to plaintiff's knowledge. On the trial he offered testimony of Wolf as to personal transactions with H. relating to the consideration for the mortgage. The court held that such testimony came within the prohibition of § 829 of the Code.

Thomas H. Rodman, Jr., for *appls.*

Leopold Turk, for *respt.*

Held, No error. The argument to the contrary in behalf of the appealing creditor is that he does

not derive title through Wolf, but against Wolf and in hostility to him. In the case of Taylor v. Meldrum, 6 Civ. Pro., 235, however, the General Term of the Fourth Department expressed the opinion that a judgment creditor derived title through his judgment debtor within the meaning of this section; and this view seems to us correct. It may well be that the creditor has some rights against third parties which would not be available to the debtor; but it is through or by means of the acts of the debtor that the appellant Cormier has any standing in the present litigation.

The answer admitted the making and recording of the bond and mortgage, but denied that either was ever delivered. A certified copy of the mortgage as recorded in the register's office was put in evidence with the assignment to plaintiff; but the bond was not produced. It is claimed that these proofs furnished no ground for judgment.

Held, Untenable. If the defense had been payment, the non-production of the bond, unexplained, would have been fatal to plaintiff's case. 83 N. Y., 49. Here, however, there was no such plea. The execution of the bond and mortgage was expressly admitted, but the delivery of either instrument was denied. Sufficient proof of the delivery of the mortgage was furnished by showing that it had been placed on record; and in the absence of any other evidence on the subject we are inclined to think that a delivery of the bond

may be inferred from the fact that a mortgage was delivered referring to the bond as a valid and subsisting obligation.

Judgment affirmed.

Opinion by *Bartlett, J.*; *Van Brunt, P.J.*, and *Daniels, J.*, concur.

ASSIGNMENT FOR CREDITORS. CHATTEL MORTGAGE.

N. Y. COURT OF APPEALS.

Sullivan et al. v. Miller et al.
Little et al., *appls.*, v. Ames,
recr., *respt.*

Decided Oct. 4, 1887.

The general creditors of a mortgagor of chattels have no right to assail a mortgage made by him as invalid until they have secured a lien thereon by levy under execution or by some other method acquired a legal or equitable interest in the property.

A mortgagor of chattels has an assignable interest in the property which passes, subject to payment of liens, to his assignee for creditors.

After waiting a reasonable time for claimants to establish their rights to the property it is the duty of the assignee or the receiver appointed in his place to take the direction of the court as to its disposition, and he is under no obligation to give notice to the general creditors of his application for such direction.

The appellants instituted these proceedings to vacate and annul an order previously made in the above entitled action, which authorized the receiver to sell certain property and pay the liens thereon, and to obtain an order requiring the receiver to pay the amount of a judgment recovered by them against the defendant M. The relief sought was denied by the Spe-

cial Term. It appeared that on Jan. 4, 1883, M., being financially embarrassed, made a general assignment to K. for the benefit of his creditors. Among the property thus assigned were certain stereotype and electrotype plates, then in the possession of appellants as custodians for M. In July, 1882, M. had mortgaged these plates to one A. to secure the payment in one year from date of \$6,500, it being provided that they should remain in M.'s possession until default in the payment of the mortgage. The mortgage was not filed until the day that M. executed his general assignment. It was not claimed that the assignment or mortgage was fraudulent in fact, but the mortgage was alleged to be void as against creditors and *bona fide* purchasers for want of filing at the time of execution. In March, 1883, appellants recovered judgment against M. for an indebtedness accruing between July, 1882, and Jan., 1883, and in March, 1883, attempted to levy upon the plates under an execution issued upon such judgment. The assignee, for some violation of his duty as such, was by an order of the court in this action, on Feb. 19, 1883, removed, and A. thereupon appointed receiver *pendente lite* of the property covered by the assignment. After his appointment A. attempted to obtain possession of the plates from appellants, but they refused to give them up, claiming to hold them upon the levy of their execution, and when this claim was adjudged against them, under a lien for

storage. Both of these claims were duly presented to the court in proceedings instituted by A. against the appellants and the sheriff to recover possession of the property, in which it was adjudged that the appellants had no lien upon it, and that A. was entitled to the possession of the property. This order was not appealed from. Previous to July, 1883, the appellants delivered the plates to the receiver, and he thereafter held them. Subsequent to July, 1883, no further proceedings were instituted by the appellants until the present proceedings were commenced in Nov., 1884. In March, 1884, the receiver applied *ex parte* to the court for its direction as to the disposition of the property, upon a petition showing that it was of greater value than the amount of the lien upon it, and that its further retention by him would entail large expense upon the estate. On March 15, 1884, an order was made which this proceeding seeks to vacate directing the receiver to sell the property for not less than \$7,800, and to pay the mortgage debt out of the proceeds. The receiver thereupon sold the property at public sale and with a portion of the proceeds paid the mortgage debt.

James R. Marvin, for appls.

Thomas D. Robinson, for resp.

Held, That as at the time of the sale of the property by the receiver the appellants had acquired no lien either legal or equitable upon it, and no legal right to demand of the receiver the payment of their judgment, their remedy, if they

had any, was to obtain the order of the court directing the disposition of the proceeds of the fund. Until this was done it was the receiver's duty to proceed in the execution of the duties of his office and convert the assigned estate into money, and pay out the proceeds under the direction of the court. 105 N. Y., 375.

The general creditors of a mortgagor of chattels have no right to assail a mortgage or other conveyance made by him as invalid until they have secured a lien thereon by levy under a judgment and execution, or have by some other method acquired a legal or equitable interest in the property. 72 N. Y., 426; 63 *id.*, 256.

Also held, That M. had an assignable interest in the property, the legal title to which, subject to the payment of liens thereon, the assignee took, and the receiver succeeded to his rights. When the mortgage became payable in July, 1883, the mortgagee became entitled as against the mortgagor and his representatives and all other persons who had not acquired liens thereon to demand and receive possession of the mortgaged property and the right to sell it and apply the proceeds to the payment of his debt; that after waiting a reasonable time for the petitioners to take steps to establish a right to the property in question it was the duty of the receiver to apply and take the direction of the court as to the disposition to be made of the property in his hands, and he was under no obligation to give notice to the gen-

eral creditors of M. of such application; that if there were creditors of M. who supposed themselves entitled to make equitable claims to any portion of the assigned estate in the hands of the receiver they were entitled to bring them to the attention of the court upon proper notice to the parties to be affected thereby; that the rights asserted by appellants to the property prior to July, 1883, having been duly litigated between the receiver and the appellants and adjudicated against the latter, the receiver had no adequate reason for supposing that the appellants intended to assert any further claim to such property; that this, together with the delay of the appellants, constituted laches, which would prevent a recovery by them, the payments made by the receiver having been made in good faith and in the execution of his duties. 28 N. Y., 671; 4 Paige, 23; 5 id., 13; Bishop on Ins. Debtors, 229.

Order of General Term, affirming order denying motion by appellants for the payment of their claims, affirmed.

Opinion by *Ruger, Ch. J.* All concur.

POLICE. RETIREMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People ex rel. David R. Bolster v. Stephen B. French et al., comrs. of police.

Decided Oct. 26, 1887.

To entitle a policeman to apply for retirement under § 307 of the Consolidation Act, as amended by Chap. 364, Laws of Vol. 27—No. 13a.

1885, where a portion of the period of twenty years has been served in the metropolitan police, it is not necessary that a continuous period of twenty years service shall have been performed, but the terms of service may be added together to produce that period.

Submission of controversy on agreed facts.

Relator was a policeman in the city of New York. He was first appointed Feb. 8, 1866, and resigned Sept. 1, 1868, and was reappointed Oct. 13, 1869, since which time he has served continuously as a member of the force. When he was first appointed the police force was acting under the Act of 1857, creating a metropolitan police district, which continued in force until the passage of Chap. 137, Laws of 1870, § 47 of which continued in office all persons then connected with the metropolitan police dept. Relator applied to defendants under § 307 of the Consolidation Act, as amended by Chap. 364, Laws of 1885, to be retired from service on the ground that he had performed duty for twenty years and upward. Defendants denied his application on the ground that he had not served continuously for twenty years.

J. E. Eustis, for relator.

John J. Townsend, Jr., for defts.

Held, Error. It has been provided by § 307 of the Consolidation Act, as amended by the act of 1885, that "in determining the terms of service of any member of the police force, services in the late municipal and metropolitan force of the city of New York shall be counted and held to be

service in the police force of the city of New York, for all purposes of this chapter." From the use of the words "terms of service" it is quite manifest, where a portion of the period of twenty years has been served in the metropolitan police force, that a continuous period of service of twenty years has not been required to entitle the applicant to be retired on a compensation of half the amount of his annual salary. But what the law has provided for by these words "terms of service" is to include so much of the time as the applicant may have served under the board of metropolitan police with the time he has served as a member of the police force of the city created by the Act of 1870, to make up the period of twenty years. The language made use of for that purpose has not required a continued or uninterrupted term of service, but it has permitted terms of service, and that will be fully satisfied by an interruption in the continuity of service, such as exists in the case of this applicant. When the language is plain and unequivocal as this is, and no reason appears for diverting it or restraining it from its ordinary and popular sense, that signification should be given it in construing and applying it. And under that construction the applicant was entitled to have the board consider as one of his terms of service the period during which he was employed as a member of the metropolitan police force before he resigned in Sept., 1868, and to add that period to his ser-

vice as a member of that force and of the present police system since Oct. 13, 1869. By adding these terms together, as relator is entitled to have that done, he has served as a member of the police force a sufficient length of time to empower the board of police commissioners to retire him pursuant to his application. But to obtain that retirement the section of the Act of 1885 which has been mentioned requires a majority vote of the full board in his favor. The law has not declared that the board shall retire him for the reason that he has performed service for these terms amounting to more than twenty years, but it has permitted him to apply to the board to be so retired. But to authorize his retirement in fact this vote has been prescribed. It has not been directed by the law that the commissioners or a majority of them shall vote in favor of his retirement. They have been invested with authority to do so, and so long as they have not been required or directed to vote for the retirement they are at liberty to vote in favor of or against his application. The effect of the law is to invest the board with this discretion, and if they consider, under all the circumstances, that it should not be exercised in favor of relator then he cannot be retired in this manner under the provisions of the law. The board did not consider whether their power was either discretionary or mandatory, but denied the application on the ground that he had not served twenty years continu-

ously as a member of the police force. In this, under the act, they were in error. As it has been framed, under the circumstances affecting relator's services, they should have acted on his application, but how they are to act and whether they shall sustain or reject it is a matter committed alone to a majority of the board. Relator is entitled to a judgment requiring such action on their part, but not directing them to vote either for or against the application.

Judgment accordingly, without costs.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Bartlett, J.*, concur.

CHATTEL MORTGAGE. CANAL BOATS.

N. Y. COURT OF APPEALS.

Keller et al., *respts.*, v. Paine, *applt.*

Decided Oct. 11, 1887.

Plaintiffs received from one F. in Pennsylvania an instrument in form of a bill of sale on a canal boat then in this State, but which was in fact a chattel mortgage; their agent immediately started to take possession of the boat, but arrived an hour after defendant had levied thereon under an attachment against F. The agent filed the mortgage and assumed possession until the sale by defendant. *Held*, Neither under the statutes relating to chattel mortgages nor the act relating to liens on canal boats were plaintiffs entitled to recover, and that the statutes of this State govern the case.

This action was brought to recover damages for the conversion of a canal boat. It appeared that defendant on March 25, 1881, at

Ilion, N. Y., as sheriff, had levied upon the canal boat as the property of F. under an execution against F. Defendant justified under an attachment issued against F., who was a resident of Pennsylvania, in an action against him by K. Bros. & Co., creditors, residing in Pennsylvania. Plaintiff claimed title under a written instrument, in form an absolute bill of sale, executed and delivered by F. to them on March 24, 1881, in the State of Pennsylvania. This instrument was in fact a chattel mortgage on said canal boat, which was at the date thereof at Ilion aforesaid. Plaintiffs immediately after the delivery of the mortgage gave it to one S., their agent, with instructions to proceed at once to Ilion and take possession of the boat. S. left by the earliest train and arrived at Ilion on March 25, at 1:30 P. M., about an hour after defendant as sheriff had levied on the boat. S. then filed the mortgage in the town clerk's office, and after filing the copy went on board the boat and assumed possession and control thereof for plaintiffs and continued in possession thereof until May 9, 1881, when defendant sold the boat under execution.

Thos. Richardson, for *applt.*

George W. Smith, for *respts.*

Held, That both under the provisions of the Revised Statutes relating to chattel mortgages and under the act in relation to liens on canal boats, Laws of 1864, Chap. 412, §§ 1, 2, plaintiffs were not entitled to recover.

The general rule that the voluntary transfer of personal property

wheresoever situated is to be governed by the law of the owner's domicil always yields when the law and policy of the State where the property is actually located have provided a different rule of transfer from that of the State where the owner lives. 4 Abb. Ct. App. Dec., 457; 3 Wal., 458; 5 id., 307; 7 id., 189; 35 N. Y., 657; 96 id., 248-255.

Judgment of General Term, affirming judgment for plaintiffs, reversed, and new trial ordered.

Opinion by *Rapallo, J.* All concur.

PRACTICE. REMOVAL.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

James Gregory, *respt.*, v. The Mayor, etc., of New York, *applt.*

Decided Oct. 26, 1887.

A request to direct a verdict is in effect a submission of the questions of fact to the court and a waiver of the right to go to the jury.

In the absence of a statute expressly conferring it, the commissioners of excise of N. Y. have no power to suspend their employees so as to deprive them of their pay.

Appeal from judgment entered on verdict directed by the court.

Action to recover salary as excise inspector in N. Y. from Dec. 15, 1880. On that day plaintiff was notified that he had been suspended without pay, and after that the commissioners refused to allow him to perform any duty, although he was ready and willing to perform the same, and refused to give him a voucher or

draft for his salary, although there was money to pay him.

On Jan. 18, 1881, in pursuance of a resolution of the board a letter was prepared informing him that he was removed. The clerk testified that he sent this letter to plaintiff through the mail by depositing it in a lamp post box in said city. He did not testify that it was postpaid.

At the close of the evidence defendant's counsel moved the court to direct a verdict for defendant; but the court held that the attempted suspension was nugatory and could only be made effective by an actual dismissal from service, and that there was no satisfactory evidence that the notice of dismissal was brought to plaintiff's knowledge, and directed a verdict for plaintiff.

David J. Dean, for applt.

Elliott Sandford, for respt.

Held, No error. Assuming that the proof in behalf of defendant was sufficient to show the deposit in the mail of a letter postpaid and addressed to plaintiff, notifying him of his removal, defendant would have been entitled to go to the jury upon the question whether plaintiff actually received this notice or not, if they had asked the court to be allowed to do so. This was the view which we took in the McCoy case. Ante, * * * but in the present suit the action of the counsel to the corporation in asking the court to direct a verdict was, in effect, a submission of such questions of fact as existed in the case, if any, to the decision of the trial judge

and a waiver of the right to go to the jury. 97 N. Y., 586.

Also held, That the notice of suspension was not equivalent to a removal, and that the board of excise had no power to suspend plaintiff so as to deprive him of his pay. It seems clear that the notification to a servant that he is suspended from duty does not carry with it the implication that he is absolutely discharged from service. None of the cases cited in behalf of appellant sustains the proposition that the power to remove necessarily carries with it the power to suspend, and no authority to that effect has been brought to our attention. In the absence of any statute expressly conferring it upon them, we do not think the commissioners of excise possess any such power to suspend their employees as was attempted to be exercised in this case.

Judgment affirmed, with costs.

Opinion by *Bartlett, J.*; *Van Brunt, P.J.*, and *Brady, J.*, concur.

FRAUD. TRUST.

N. Y. COURT OF APPEALS.

Piper, respt., v. Hoard, applt.

Decided Oct. 11, 1887.

One F. had property left him, which on his death without issue would go to his brother. He conveyed his property to defendant, who thereafter brought about the marriage of F. with plaintiff's mother on the representation that F. had a fine property left him which would go to his heir in case he married and had one. Plaintiff is the only child of that marriage. *Held*, That there was sufficient

privity between the parties to sustain an action to declare plaintiff the owner of the property and place her in possession; that defendant, as trustee *ex maleficio*, should be compelled to make the thing good to plaintiff.

The complaint in this action alleged that in 1842 A. died leaving a will by which he devised a farm of which he died seized to his two sons, J. and F. subject to the limitation in case of F. that if he should die without issue the portion devised to him should belong to J. and his heirs. J. and F. took possession of the farm and continued to own it together until in March, 1859, when F. conveyed his interest to defendant, who afterward brought about a marriage between F. and C., plaintiff's mother, through false and fraudulent representations that F. had a fine property left to him, which in case he married and had an heir would go to that heir. It was further alleged that plaintiff was the only child of such marriage; that in Sept., 1859, the farm was duly partitioned between J. and the defendant as the grantee of F. by an interchange of deeds, and defendant since such conveyance has occupied the part set off to him as owner and still occupies and claims to own it. The relief prayed for was that plaintiff be declared the owner of the portion of the farm set off to defendant and placed in possession thereof. The complaint was demurred to as not stating facts sufficient to constitute a cause of action. The demurrer was overruled.

C. D. Adams, for applt.

A. M. Beardsley, for respt.

Held, No error; that the facts created sufficient privity between the parties to sustain this action; that plaintiff can claim to be in privity with defendant although he made the representations to her mother, she being the child of the marriage brought about by the fraud of the defendant practiced upon her mother, and also for the reason that she would be the owner of the property in question if the facts had been as they were represented, and defendant as a trustee *ex maleficio* should be held to make good the thing to the plaintiff, Perry on Trusts, § 170; 95 N. Y., 403; that there is no legal objection toward constituting such a trustee in favor of one who is not *in esse* when the fraud was perpetrated, so long as it can be seen that such person seeks to take the property which the defendant holds by virtue of his fraud, and which said person would be entitled to hold if the representations which defendant made in regard to it were true.

Also held, That the fact that plaintiff's mother was influenced by mercenary motives only in marrying the plaintiff's father, does not relieve the defendant from liability on account of his fraud.

The whole law of marriage as administered by courts (so far as property interests are concerned) is founded upon business principles, in which the utmost good faith is required from all parties, and the least fraud in regard thereto is the subject of judicial cognizance.

Judgment of General Term, affirming judgment on order overruling demurrer, affirmed.

Opinion by *Peckham, J.* All concur, except *Ruger, Ch. J.*, and *Andrews, J.*, dissenting, *Earl, J.*, not sitting.

CORPORATIONS. STOCK.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

In re application of Philip S. Biglin, *respt.*, v. The Friendship Association, *applt.*

Decided Oct. 26, 1887.

In proceedings under the act of 1873 for the issue of new certificates of stock, it must appear that the petitioner is the owner of the shares and that the certificates for such shares have been lost or destroyed, and cannot after due diligence be found,

Appeal from an order directing the Friendship Association to issue to the petitioner seventy-six shares of its stock in place of others lost or destroyed.

Proceeding brought under Chap. 151, Laws of 1873, to compel defendant to issue to petitioner a new certificate of stock. Issue was joined as to petitioner's ownership of the stock.

It appears that petitioner brought an action against one M. as president of the Friendship Boat Club, alleging that the club was owner of seventy-seven shares in the defendant corporation, which was admitted and the fact so found to be. A receiver was appointed who sold the property of the club, including these shares of stock, to petitioner, who obtained twenty-six shares

which he still holds. These stood in the name of M. & B. as trustees, and there was no indorsement authorizing a transfer. The remaining fifty shares were not in the receiver's possession and were not delivered to petitioner.

By the affidavits used in this proceeding it appears that the fifty shares were issued to M. & B. as trustees of individual members of the club; that they were not lost or destroyed, but remained in the hands of the trustees for the benefit of the beneficiaries. These facts were not disproved by the other affidavits.

C. W. West and Elliot Sandford, for applt.

Chas. Blandy, for respt.

Held, That the order was erroneous. That to bring the case within the statute, two facts must be maintained; that the petitioner is the owner of the shares, and that such shares have been lost or destroyed, and cannot, after due diligence be found. These are the jurisdictional facts upon which the court is to act, and without proof of such facts it has no authority to make the direction mentioned in the statute.

The fact that he had the possession of the twenty-six shares was conclusive evidence that they had neither been lost nor destroyed. As to them the evidence presented at least a decided probability that they were owned by the boat club at the time when the receiver's sale took place, and that the petitioner acquired the title to them under the sale. But that did not authorize him to maintain this

proceeding for new certificates of stock in their place under this statute, which has only provided for such proceeding when the shares have been lost or destroyed, or cannot, after due diligence, be found. The remedy of the petitioner for the transfer of other shares in place of the twenty-six so acquired by him is not under this statute, but by means of other legal proceedings.

That the rights of the beneficiaries were not affected by the former judgment. None of them, except M., were parties to that action. And while it was against M. as president of the club, the suit was not brought against him in his capacity of a trustee for the persons for whom these shares were held by himself and B. As to all the beneficiaries, therefore, except M., the action in the Superior Court was between different and distinct persons from these beneficiaries, and could have no effect in the way of determining their title to these shares. And as the proof in this proceeding established the fact that the boat club has no interest in the fifty shares, the receiver appointed in the action acquired no right to sell them, and the petitioner obtained no title to these shares under the sale.

The fact that petitioner was the owner of the shares, as it was alleged he was in his petition, was not only not proven, but it was disproved by the evidence given on behalf of the association, and so likewise was the allegation of the loss or destruction of the shares. It was proven that they were not

lost, but were held by and in the possession of one of the trustees.

Indeed, the order which was finally made in the proceeding does not state the fact that the shares had been lost or destroyed, but the statement is that "they have been lost or destroyed as to the applicant Philip S. Biglin and that they cannot, after due diligence, be found in contemplation of law." This was not such a finding as the statute has made necessary to comply with its provisions and to justify an order for the issuing of a new certificate for the shares.

Order reversed and application denied.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Brady, J.*, concur.

MORTGAGE. TENDER.

N. Y. COURT OF APPEALS.

The Equitable Life Ins. Co., *respt.*, v. Von Glahn, *impl'd.*, *applt.*

Decided Oct. 25, 1887.

The mortgage to plaintiff provided that if the taxes were not paid the mortgagee might pay them and the same and expenses should be a lien on the premises. Defendant purchased the premises on foreclosure of a junior mortgage, and tendered a sum in excess of the amount due on plaintiff's mortgage, but not enough to include a sum paid to a tax examiner who obtained a reduction of taxes unpaid by the mortgagor. *Held*, That the tender was not sufficient.

This was an action to foreclose a mortgage. It appeared that on Nov. 1, 1869, defendant D. executed to plaintiff a mortgage

which contained a clause that the mortgagor should pay "all taxes, charges and assessments which may be imposed by law upon said mortgaged premises, or any part thereof, and in default thereof, it shall be lawful" for the mortgagee "to pay the amount of said tax, charge or assessment, with any expenses attending the same; and any amount so paid" the mortgagors covenanted to repay with interest, and that the same should be a lien upon the premises. On May 5, 1870, D. executed another mortgage on the same property to the defendant V. G. The latter foreclosed his mortgage, and on March 15, 1883, on the sale under said foreclosure bid in the premises. The next day he received a deed thereof and has ever since owned and been in possession of said premises. On the day of the sale V. G. informed plaintiff of his purchase and possession, and on April 9, 1883, tendered to it \$5,830 in United States legal tender currency in payment of the mortgage. At the time of the tender there was due on the mortgage \$5,797.93, but plaintiff claimed in addition thereto \$58.48 paid to one M., an expert tax examiner, who had obtained a reduction of certain taxes which were unpaid by the mortgagor.

Freling H. Smith, for *applt.*

George Waddington, for *respt.*

Held, That the tender was insufficient in amount and ineffectual and was not available as a defense in this action.

Judgment of General Term, reversing judgment dismissing com-

plaint, affirmed, and judgment absolute on stipulation.

Opinion by *Earl, J.* All concur; *Danforth, J.*, in result; *Ruger, Ch. J.*, not voting.

POLICE. REMOVAL

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

The People ex rel. Michael H. Brady v. Stephen B. French et al.

Decided Oct. 26, 1887.

Relator, having been ill, reported for duty sooner than he should have done, and while on duty was taken with a chill for which a friend persuaded him to drink a little brandy. He did so and in his weakened condition became intoxicated. *Held*, That this would not authorize his removal on a charge of conduct unbecoming an officer.

Certiorari to review proceedings by which relator was removed from the police force of New York City.

The charge against relator was conduct unbecoming an officer, and the specification that he was so much affected by the influence of liquor Feb. 21, 1887, as to be unfitted for the performance of police duty. Relator confessed the charge, and explained that he had been sick for several days, in which he was corroborated by his physician; that supposing himself sufficiently recovered he reported for duty, and that while on duty and toward the close of his days service he was attacked with a chill, and while in this condition was persuaded by a friend to drink a small quantity of brandy to revive and strengthen him;

that his friend procured the brandy which he drank and by reason of his ill health it intoxicated him. That he had never drank any liquor before and only did so to relieve himself from the chill and secure the ability to continue to perform his duty. The police surgeon testified that a person in relator's condition might be affected in this manner by a small quantity of liquor, and the police sergeant testified that relator was a person of temperate habits and highly spoken of by persons who had known him from childhood. On this evidence the board of police removed him.

Louis J. Grant, for relator.

John J. Townsend, Jr., for respts.

Held, Error. Relator was a man in no way addicted to the use of intoxicating liquors, and it was not at his own instance that he made use of it at this time, but upon the suggestion of a friend who appears to have provided it with the best intention, and that was to relieve relator from the attack from which he was at the time suffering. He was in a condition when it was entirely proper that something should be done for him in the way of providing a remedial agent, and that produced by his friend was considered to be what he required under this involuntary circumstance. The charge made against relator contemplated voluntary misconduct as distinguished from real misfortune. Such misconduct this evidence did not tend to establish, for it proved him to have been subjected to an

affliction requiring the aid of a stimulant without any voluntary action producing it on his part. The case in this respect is entirely exceptional and not attributable to that class where the misconduct or voluntary action of the party himself is the cause of intoxication. There it would be entirely proper for the commissioners to punish that act by dismissal from the force, but here it is not, for relator was placed in the condition in which he was found by the force of circumstances, not brought about in the least degree by any misconduct or neglect on his part. It was rather the result of a controlling disposition faithfully to render the services appertaining to his position as an officer, and he should not have been punished in this manner, because of his having been brought into this condition by the force of this circumstance. The discipline and good conduct of the patrolman did not require so harsh a remedy, neither was it deserved or justified by the fact made to appear by this evidence. While it is the duty of the court to interfere cautiously with the management of the force by the commissioners, the conclusion cannot be avoided, upon the proof submitted to them, that in this case they erred in ordering the dismissal of relator from the force, and as a verdict of a jury would be set aside as against the weight of evidence on proof of this description, the order should be reversed and order directed for his restoration, without costs.

Opinion by *Daniels, J.; Van Brunt, P.J., and Brady, J.,* concur.

CORPORATIONS. STOCK-HOLDERS.

N. Y. COURT OF APPEALS.

Hollingshead, respt., v. Woodward, applt.

Decided Oct. 11, 1887.

Whenever an existing stockholder is divested of his interest in or control over the affairs of a corporation, whether by voluntary transfer or by compulsion, as by forfeiture on the declaration of the company, time begins to run, and at the end of two years the statutory limit is reached and no action can be maintained against him; the same result follows on the actual dissolution of the corporation by formal judgment.

Reversing S. C., 21 W. Dig., 229.

This action was brought to charge defendant as a stockholder of a corporation organized under the General Manufacturing Act, Chap. 40, Laws of 1848, on the ground that the whole of the capital stock of said corporation had never been paid in and that the certificate of payment had never been filed as required by the said act. Defendant set up among other defenses that more than four years before this action was commenced a judgment was rendered in the Supreme Court against said corporation whereby its property was sequestered and a permanent receiver of its property and effects was appointed, who was vested with the exclusive control thereof and its officers and agents restrained from all interference with the same; that

said receiver immediately took possession as authorized, and has distributed the property and effects of the corporation among its creditors under direction of a court, which were not sufficient to satisfy its debts. Defendant further alleged that from the date of said sequestration he ceased to be a stockholder of said corporation. The answer was demurred to and the demurrer overruled and the complaint dismissed.

Thomas G. Sherman, for applt.

Thomas S. Moore, for resp't.

Held, No error; that under § 24 of the Manufacturing Act, Chap. 40, Laws of 1848, which provides that "no suit shall be brought against any stockholder who shall cease to be a stockholder in any such company * * * unless the same shall be commenced within two years from the time he shall have ceased to be a stockholder," the defense was a good one; that the judgment divested the defendant of his interest as a stockholder and for more than two years before the commencement of this action his liability had ceased.

Whenever an existing stockholder shall be divested of his interest in or control over the affairs of a corporation, whether by voluntary transfer or by compulsion, as by forfeiture upon the declaration of a company, time begins to run, and at the end of two years the statutory limit is reached. The same result follows upon the actual dissolution of a corporation by formal judgment, or by a surrender of its corporate rights, etc.

19 Johns., 456; 17 N. Y., 93; 80 id, 379; 5 Johns. Ch., 366; 8 Cow., 387; 24 Wend., 473; 6 Paige, 497.

Kincaid v. Dwinelle, 59 N. Y., 548, limited and distinguished.

Judgment of General Term, reversing judgment on order of Special Term, reversed, and judgment of Special Term affirmed.

Opinion by *Danforth, J.* All concur, except *Peckham, J.*, not sitting.

VILLAGES. HIGHWAYS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The People ex rel. Dwight F. Rundell, *applt.*, v. William W. Weston, Treasurer of the Village of Little Valley, *resp't.*

Decided Oct., 1887.

The treasurer of a village organized under the General Act of 1870 is required to keep the fund raised for highway purposes separate and distinct from that raised for other purposes, to be devoted solely to the making and improving of the roads, streets, etc., of the village; and when the trustees of the village attempt to draw this fund for the purpose of paying for lands for highway purposes, he may properly question the legality of this action and disregard their order in the premises.

Appeal from order denying motion for a writ of mandamus.

Relator applied for either a peremptory or alternative writ of mandamus to compel defendant, as treasurer, etc., to pay an order drawn upon him by the trustees of the village in favor of B. for \$25, "which sum has been audited and allowed, payable out of the moneys appropriated for highway tax to be assessed during the year in said

village, for the year 1886. By order of the trustees."

The motion was opposed upon the ground that the board had no right to issue the warrant payable out of the money appropriated for highway tax. The trustees had purchased of B. a parcel of land for the purpose of opening a street for \$175, and this order was drawn for the balance due him. Subsequently, on March 22, 1886, a resolution was passed directing that \$550 be raised for highway purposes for the ensuing year. The collector had collected of the highway tax so assessed and paid over to the treasurer more than enough to pay the order in question. It appeared that all of the funds raised for highway purposes were necessary for the purposes specified, and that no part thereof was raised for the purpose of paying the order in question. The village was incorporated under the general law, Chap. 291, Laws of 1870.

The Special Term denied the motion for a mandamus.

C. Z. Lincoln, for applt.

J. J. Mosher, for resp't.

Held, That the treasurer of the village is required to keep the fund raised for highway purposes separate and distinct from that raised for other purposes, to be devoted solely to the working and improving of the roads, streets, etc., of the village, and when the trustees attempted to draw upon this fund for the purpose of paying for lands acquired for opening a highway their action was in violation of the statute and void. Laws 1870, Chap. 291, Title 4, § 6.

Special provision is made for the payment of lands acquired for highway purposes. Title 7.

It is contended that the treasurer had no power to overrule the action of the trustees, and that if he had paid the order in question he would have been protected. Possibly this may be, for the reason that the order does not upon its face show that it was not drawn for the purpose of paying for work upon the streets, and in the absence of knowledge to the contrary, he would, perhaps, have been justified in assuming that the order was drawn for a purpose authorized by the statute. But that would not warrant the court having knowledge of the facts in violating the statute by compelling a diversion of the funds to unauthorized purposes through its writ of mandamus. The trustees not having any power to draw the order out of the fund upon which it was drawn, the treasurer was not bound to pay it.

Held further, That the village was not estopped by the action of the board of trustees from questioning the right of relator to have the order paid out of the moneys raised for highway purposes.

The board, it appears, was differently constituted when the order was presented for payment from what it was when the order was drawn. The illegal and unauthorized acts of a former board are not binding upon the new board, and they are not estopped from questioning the legality of their proceedings.

Order affirmed, etc.

Opinion by *Haight, J.; Smith, P.J., Barker and Bradley, JJ.*, concur.

PERJURY. INDICTMENT.

N. Y. COURT OF APPEALS.

The People, *appls.*, v. Clements, *respt.*

Decided Oct. 18, 1887.

An indictment for perjury is sufficient if it negatives in substance the facts sworn to by defendant. *So held*, Where the indictment set forth the facts sworn to and alleged that at the time defendant well knew them to be false and untrue.

A demurrer to an indictment for imperfection in the form of the allegations is not permissible.

Defendant was charged with perjury in the verification under oath of a quarterly report made by him as cashier of a State bank to the banking department. Defendant's affidavit was set forth in the indictment, and stated that the report, with the schedule accompanying it, both of which were set forth in full, was in all respects a true statement of the condition of said bank before the transaction of any business on March 22, 1884, to the best of the knowledge and belief of the deponent. The indictment charged that on March 22 and 29, 1884, the defendant had full and certain knowledge of the real and true condition of the affairs, transactions, assets and liabilities of said bank, and of all the matters and statements contained in said report and schedule. It then set forth the schedule and affidavit

verifying the same, and averred that defendant when he swore to it well knew that the report and schedules were false and untrue. It then specified several statements in the report, each of which it averred that defendant knew at the time he swore to the report were otherwise than as stated; it specified particularly the difference and charged that these statements were then well known to the defendant to be not true according to the best of his knowledge and belief. Defendant interposed a demurrer to the indictment, which was overruled. He then pleaded not guilty and after a verdict was rendered against him made a motion in arrest of judgment which was denied.

Edgar Hull, for applt.

Lyman G. Northrup, for respt.

Held, That the indictment, although it did not negative in direct terms the facts sworn to by defendant, did so in substance and that that was sufficient. The Code of Crim. Pro. does not permit a demurrer to an indictment for imperfection in the form of the allegations. § 285. Under the indictment here the prosecution, to convict defendant, was required to prove that he knew the specified statements in the report to be false, and this proof necessarily involved proof that they were false.

Judgment of General Term, reversing judgment of conviction and discharging defendant, modified by awarding a new trial, instead of discharging defendant, and as modified affirmed.

Opinion by *Rapallo, J.* All concur, except *Earl, J.*, not voting.

SLANDER. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Frank Calkins, *applt.*, v. Orlin Colburn, *respt.*

Decided Oct., 1887.

In an action of slander in charging plaintiff with having committed abortion upon defendant's daughter, it is competent for defendant to show, in mitigation of damages and to disprove malice, that before the speaking of the words alleged he had been informed by his daughter that plaintiff had committed abortion upon her, and he believed it to be true.

In action for slander evidence as to plaintiff's bad character must be confined to the time before the uttering of the slanderous words, and it is error to allow a witness to answer generally as to plaintiff's character. But where the plaintiff afterward testifies as a witness in his own behalf his credibility and general character becomes a proper subject of inquiry down to the time of trial, and cures the error committed.

In such an action, a witness testifying to plaintiff's good character may be asked, upon cross-examination, whether he had heard of plaintiff's being intimate with other men's wives, as tending to show that his reputation was not good.

Appeal from judgment entered upon verdict, and from order denying new trial.

Action for slander in charging plaintiff with having committed abortion upon defendant's daughter. The answer alleged that defendant was informed and believed that plaintiff did commit

abortion upon his daughter, and that the same would be proved in mitigation of damages, etc. Defendant testified, under objection, that before speaking the words alleged, he had been informed by his daughter that plaintiff had committed abortion upon her, and that he believed it to be true.

A. C. Calkins, for *applt.*

Torrance & Blackman, for *respt.*

Held, Competent; that defendant had the right to prove that the words were uttered in good faith and without malice, in mitigation of damages. 81 N. Y., 246; 72 *id.*, 36; 23 Hun, 50; 21 W. Dig., 34.

A witness testified that he was acquainted with plaintiff and his character in the community in which he lived. He was then asked, "What is his character; good or bad?" Objected to upon the ground that the inquiry should be confined to the time before the commencement of the action. Overruled and exception taken. The witness answered that his character was bad.

Held, That the objection was well taken; that the evidence must be limited to the time before the uttering of the slanderous words, and it is not competent to prove bad character thereafter which may be based, in whole or in part, upon the slander uttered. 2 Wend., 352.

But held, That as plaintiff was afterward sworn as a witness in his own behalf, his credibility as a witness then became a ques-

tion for consideration, and upon that question his general character was a proper subject of inquiry down to the time of his appearance as a witness, and that this made the evidence competent and cured the error committed.

A witness for plaintiff testified that his reputation was good. Upon cross-examination he testified, under objection, that he had known of plaintiff carrying a revolver, and had heard about his being intimate with another man's wife. The court afterward directed that the answer in regard to the revolver be stricken out, and told the jury "it was not competent evidence." It is contended that the action of the court did not prevent plaintiff from being prejudiced by the answer.

Held, That the evidence in respect to plaintiff having been intimate with another man's wife was competent. It was proper, on cross-examination, to show upon what the witness based his opinion and, if possible, that plaintiff's reputation was not good. 10 Hun, 358.

Held further, Assuming that the answer in respect to plaintiff's carrying a revolver was incompetent, the jury was given to understand that it was not proper evidence for their consideration, and inasmuch as it has but a slight bearing, if any, upon the case, the error in its admission, if any, was cured.

Judgment and order affirmed.

Opinion by *Haight, J.; Smith, P.J., Barker and Bradley, JJ.*, concur.

PRACTICE. ADJOURNMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Louis Obart, *respt.*, v. The Simonds Soap Co., *applt.*

Decided Oct. 26, 1887.

In an action for injuries sustained by the fall of an elevator to plaintiff while in defendant's employ application for an adjournment was made on an affidavit stating that a material witness was unable to attend by reason of sickness, and that he would testify that as superintendent he had forbidden the men to ride on the elevator. *Held*, That in the absence of denial of these facts a case for adjournment was made and it was error to deny it.

Appeal from judgment entered on verdict.

Action to recover for injuries sustained by plaintiff while in the employ of defendant caused by the fall of an elevator. At the time of the accident plaintiff and another man were engaged in moving loads of silex from one floor to another, both of them getting on with the loads. On the second trip the rope broke and plaintiff's leg and ankle were injured by the fall.

On the case being called for trial defendant moved to postpone on the ground of the absence of two witnesses, one of whom afterward appeared and testified. The affidavit as to the other stated the nature of the action; that defendant had a good defense on the merits; that the witness, who was defendant's superintendent, would testify that he had notified the men not to ride on the elevator; had ordered them not to do so and had warned them against it, in

plaintiff's presence and hearing; that he had examined the rope a few days before the accident and found it in apparently good condition; that he was a material witness and defendant could not safely go to trial without his testimony; that there was no necessity to subpoena him as he was in defendant's employ and held himself at all times ready to attend, but that he was too sick to attend court, but would be able to do so in two or three weeks. There was no denial of these facts.

The court denied the application, and the case proceeded, resulting in a verdict for plaintiff.

S. R. Ten Eyck, for applt.

Henry Stanton, for respt.

Held, Error. The affidavits upon which defendant moved the court to postpone the trial were uncontradicted, and in the absence of any denial of the facts alleged therein established a proper case for an adjournment to some future day. Under these circumstances it was error for the court below to deny the motion.

Judgment reversed and new trial granted, costs to abide event.

Opinion *per curiam*.

SHIPS AND SEAMEN. NEGLIGENCE.

N. Y. COURT OF APPEALS.

Scarff, respt., v. Metcalf et al., applts.

Decided Oct. 18, 1887.

A vessel was owned by Y. and M.; by an arrangement between them Y. was to sail her as master on shares; M. to have nothing to do with manning her, hiring

the seamen or paying the expenses, but to have half the balance of the receipts after paying expenses. *Held*, That the arrangement was not a demise of the vessel, and that both owners were liable for damages to one of the crew caused by a failure of the captain to procure proper treatment.

Affirming S. C., 22 W. Dig., 63.

This action was brought to recover damages for injuries received by plaintiff while mate on board of a vessel and in performance of his duties during a voyage resulting from the alleged negligence of the captain. It appeared that the vessel was owned by Y. and M.; that under an agreement with M., she was sailed by Y. as master, on shares. M. was to have nothing to do with the manning of the vessel or the victualing of the crew or hiring the seamen or paying the running expenses, all expenses were to be paid out of the gross earnings and he was to have one-half the balance. The vessel was consigned to him and he exercised some authority over her. A judgment was rendered in favor of the plaintiff against both the owners.

Joseph A. Shoudy, for applt.

William Sullivan, for respt.

Held, No error; that the arrangement between Y. and M., was neither in form or substance a demise of the vessel, and that Y., who was master, remained a servant and agent of the owners, both of whom were liable.

Judgment of General Term, affirming judgment on verdict for plaintiff, affirmed.

Opinion by *Finch, J.* All concur.

CRIMINAL CONVERSATION.
JURISDICTION.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

Chester A. Burdick, *respt.*, v.
Sylvanus D. Freeman, *applt.*

Decided Oct., 1887.

The courts of this State have jurisdiction of controversies between residents of other States arising out of torts - *e. g.*, crim. con.—committed there, even though the defendant was served while but casually within the State and about to depart therefrom; but the court may, in the exercise of a sound discretion depending upon the facts and circumstances of the particular case, refuse to entertain actions of that character.

But the trial court should be distinctly called upon, as soon as practicable in the course of the trial, to exercise such discretion in order to present the question for review upon appeal.

A mere request to charge the jury that plaintiff cannot maintain his action in the courts of this State is not sufficient to present the question whether the trial court, in the exercise of the discretion vested in it, should have refused to take cognizance of the case.

Appeal from judgment entered upon verdict, and from order denying motion for new trial.

Action to recover damages for enticing away plaintiff's wife and for harboring and debauching her. All parties were and for many years had been citizens and residents of Pennsylvania, and none of the acts complained of were committed within this State. Defendant was a physician and a graduate of the Buffalo Medical University, and at the time this action was commenced he was temporarily in Buffalo attending the commencement exercises of the university, and was in the act of taking the

cars on his return home when he was arrested upon an order issued in this action. At the conclusion of the evidence, defendant asked the court to charge that plaintiff cannot maintain this action in the courts of this State, which was refused and exception taken. No motion to dismiss the complaint was made upon this ground. It was contended, upon appeal, that the courts of this State should not retain jurisdiction of an action of this character when all of the parties reside in another State, and when none of the acts relied on occurred here.

C. B. Wheeler, for *applt.*

Tracy C. Becker, for *respt.*

Held, That the courts of this State are vested with jurisdiction and power to hear and determine controversies between citizens and residents of other States growing out of personal torts (*e. g.*, crim. con.) committed there, even though the party defendant was served and arrested while casually within the State and in the act of departing therefrom; but the court may, nevertheless, in the exercise of a sound discretion depending upon the facts and circumstances of the particular case, refuse to entertain jurisdiction of actions of that character. 14 Johns., 134; 1 Cow., 543; 54 Barb., 31; 3 Hun, 70; Wharton's Conflict of Laws, § 707.

Molony v. Dows, 8 Abb., 316, not followed.

Lister v. Wright, 2 Hill, 320; *Latourette v. Clark*, 45 Barb., 327; *McIvor v. McCabe*, 26 How., 257, explained and distinguished.

But the trial court should be distinctly called upon to exercise such discretion and to dismiss the complaint in order to present the question for review upon appeal.

That the request to charge may well have been understood by the court to refer to the question of jurisdiction, and not as calling upon it to exercise the discretion vested in it. The trial was a long one, occupying eleven days, and had defendant desired to avail himself of this objection he should have called upon the court, as early as practicable, to pass upon it, instead of waiting until the end of the trial.

Judgment affirmed.

Opinion by *Haight, J.; Smith, P.J., Barker and Bradley, JJ.*, concur.

GUARDIANS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

In re estate of Jennie D. Vandewater, an infant.

Decided July, 1887.

The fact that the name of the guardian was suggested by the petitioner does not render the appointment invalid.

It is not necessary that a relative of the infant be appointed guardian; but in many cases such appointment would be improper by reason of adverse interest.

The exercise of the discretion of the surrogate in selecting a proper person as guardian is not reviewable so long as no legal disqualification seems to exist in the appointee.

Appeal from order of surrogate appointing a general guardian of the estate of Jennie D. Vandewater, who is an infant under

fourteen years and who is interested in the estate of her grandfather.

The guardian appointed was not a relative of the infant, and his name was suggested by the petitioner.

R. Baker, for applt.

O. D. M. Baker, for respt.

Held, That as the minor was under fourteen it was the duty of the surrogate to nominate and appoint a guardian, but that the fact that the name of the person who was afterward appointed was suggested by the petitioner does not render the appointment invalid.

In the selection of a proper person the surrogate exercised his discretion, and that discretion is not reviewable in this court so long as there seems to exist no legal disqualification in the appointee.

Neither was the surrogate bound by any former rule in chancery to appoint a relative. It may have been that such an appointment would have been improper by reason of adverse interest and want of proper qualification on the part of the relatives of the minor.

Held, (per DYKMAN, J.) That the circumstances surrounding this minor and her possible interest in the estate of her grandfather conspire in justification of the selection of a disinterested person for her guardian. The interests of appellants are plainly adverse to the minor, and if her rights are to be ascertained and secured the task must devolve upon others.

Order affirmed, with costs.
Opinions by *Pratt* and *Dykman*,
JJ.; *Barnard*, *P.J.*, concurs.

INSURANCE AGENT. COM- MISSIONS.

N. Y. SUPREME COURT. GENERAL
TERM. FIRST DEPT.

Henry Hale, *respt.*, v. The
Brooklyn Fire Ins. Co., *applt.*

Decided Oct. 26, 1887.

Plaintiff was employed as an agent by defendant, which employment was renewed by an agreement in writing by which the company also agreed to give him regular renewal commissions on policies obtained by him when the premiums were paid. *Held*, That this entitled him to renewal commissions on policies obtained by him during the year, and that a subsequent abrogation of the contract before the close of the year did not deprive him of the right to receive such renewal commissions.

Appeal from judgment for plaintiff entered on report of referee.

Action to recover renewal commissions on policies of fire insurance obtained by plaintiff as agent for defendant. He had prior to Feb. 13, 1880, been in defendant's service and procured policies. On that day defendant's president wrote offering to retain his services on a specified salary and a bonus on the policies he obtained. One of the terms was, "the company agree likewise to give you regular renewal commissions on the policies obtained by you, when the premiums shall have been paid to the company." Plaintiff accepted this offer, and continued

to work for defendant until Dec. 31, 1880, when the contract was terminated by consent of the parties and plaintiff went to work for another company. This action was brought to recover renewal commissions for the years 1881 to 1884 inclusively on policies obtained by plaintiff before and during 1880, and the referee found him entitled thereto and rendered judgment therefor.

William H. Ford, for *applt.*

Hamilton Wallis, for *respt.*

Held, No error. A renewal commission, according to the uncontradicted testimony of the president of the defendant corporation is the commission on premiums paid on a policy subsequent to the first year's payments. It is obvious that such commissions can never become due until the second year of the life of the policy. Defendant contended on the trial that the phrase "policies obtained by you" in that part of the agreement concerning renewal commissions meant only such policies as plaintiff had procured prior to the execution of the contract; but the referee correctly rejected this construction and held that the commissions were plainly to be paid on policies obtained, as he says, under the contract, that is to say, between Feb. 13 and Dec. 31, 1880. That they were payable on policies taken out through the agency of plaintiff prior to the execution of the contract appears to have been assumed without question by both parties, for renewal commissions on such earlier policies seem to

have been paid to plaintiff by defendant during 1880, while the contract was in full force and effect, and defendant had insisted throughout the case, and now insists, that the contract contemplated no other or later policies whatever. During the existence of the contract plaintiff's right to commissions on premiums received by the company after the premiums for the first year had been fully paid became fixed as soon as plaintiff caused a policy to be taken out. The subsequent abrogation of the contract of employment by mutual consent did not deprive him of his right. So far as the contract remained executory the agreement to terminate it destroyed it as to both parties, but to this extent it had been executed by plaintiff and the mutual abandonment of the contract did not take away his right to the renewal commissions already earned any more than the expiration of the contract by the efflux of time would have done at the end of a year from the date of the agreement. In an action for goods sold and delivered the plea that the sale and delivery were made under a contract which has subsequently been wholly annulled and rescinded by both parties constitutes no defense. 1 M. & W., 231. So far as the policies are concerned upon which plaintiff claims renewal premiums the insurance company has derived all the benefit which was intended under the contract, and the agreement to rescind does not bar the agent from recovering his just compensation.

Shaw v. Home Life Ins. Co., 49 N. Y., 681, distinguished.

As to the charge that plaintiff failed to perform his duties under the contract, the testimony is conflicting, but the referee's conclusion in plaintiff's favor is amply sustained by the proof.

Judgment affirmed, with costs.

Opinion by *Bartlett, J.*; *Van Brunt, P.J.*, concurs; *Daniels, J.*, dissents on the ground that the contract was only for a year; that the provisions for payments were for the year's services; that the renewal commissions were for prior policies and that the rescission entirely terminated all transactions between the parties.

FORECLOSURE. COUNTY COURT.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John Thomas, treasurer of Genesee County, respt., v. Harriet E. Harmond et al., appls.

Decided Oct., 1887.

The County Court has no jurisdiction or power in an action to foreclose a mortgage upon an undivided interest in a certain lot to reform the instrument upon the ground of an alleged mistake, so as to make it cover the whole interest in the lot, and to decree a foreclosure and sale accordingly.

Appeal from a portion of the judgment of the County Court.

Action to foreclose a mortgage upon the undivided one-half of a lot. The complaint alleged that a mistake was made in drawing the mortgage; that it should have included the whole of the lot, and

that such was the agreement before the execution of the mortgage, and prayed for a reformation of the instrument and for the sale of the whole lot. Judgment was granted accordingly. Defendant appealed from that portion of the judgment correcting the mistake and decreeing a foreclosure and sale of the portion not covered by the mortgage, upon the ground that the court had no jurisdiction to correct the mistake therein, and to include in the decree of foreclosure lands not embraced within the mortgage.

H. R. Cone, for applt.

N. A. Woodward, for resp't.

Held, That the County Court had no jurisdiction or power to grant the equitable relief of reformation of the mortgage in an action of foreclosure, so as to include lands not embraced within its terms. Code Civ. Pro., §§ 349, 348; 6 N. Y., 176. The power to foreclose a mortgage cannot be extended so as to include equitable liens, like a proceeding to enforce the payment of the purchase money out of lands. If the correction of the mistake was an incident jurisdiction existed, otherwise not. So that the whole controversy is narrowed down to the question, whether that portion of the decree correcting the mutual mistake and adjudging the mortgage a lien upon the whole lot, is within the jurisdiction of the County Court *as an incident*. "Incident" is defined as belonging or appertaining to, following, depending on another thing as more worthy, or principal." Burrill's

Law Dict. "In law, something necessarily appertaining to and depending on another, which is termed the principal." Webster.

It is difficult to see how lands not covered by the mortgage are incident to those which are. No importance can be attached to the fact that the mortgage covers an undivided part of a lot or farm; the remainder is no more an incident than a separate lot would be. If the original agreement provided for the mortgage of several lots, and by mutual mistake some were omitted, all could be included in an action to foreclose the mortgage, by showing the mistake, if this court has jurisdiction where an undivided portion was omitted. True, the only change would be to increase the relief. But if such a result is produced by including other property, it cannot be said to be only an incident.

Avery v. Willis, 24 Hun, 548, differs from this in that there was nothing to foreclose without a previous correction. The same is true here in respect to that portion not covered by the mortgage. The only distinction claimed is that here there was some land covered by the mortgage of which the court had jurisdiction, and that this conferred power to include other lands as an incident. The reasoning of that case is decisive of this. The complaint there was dismissed because no lands were embraced within it which could be foreclosed. The same is true in this case as to the undivided one-half, which could not be foreclosed until the mistake was cor-

rected. That was a condition precedent. It follows, therefore, that the case in *Hun* is decisive of this on principle, unless the fact that it had jurisdiction to foreclose a portion of the lands embraced in the complaint confers the right to correct mistakes as an incident, and to include lands in the decree not covered by the mortgage. If this view should obtain, there would be no limit to its application. All lands embraced in the original agreement, although most of the lots were left out of the mortgage, might be included in the decree of foreclosure. It might well be claimed that the legislature should confer power upon County Courts to dispose of the whole controversy in a single action; but the trouble is, it has not been conferred. The court below was impressed with the conviction that justice required a disposition of the whole controversy in a single action. Still the question of power must be met. If it was lacking, the grantee would acquire no title. If there was a want of jurisdiction of the subject matter, the decree might be attacked. 70 N. Y., 253.

The fact that the County Court has the same power as the Supreme Court in the foreclosure of mortgages is of no importance, for that court could not decree the sale of lands not covered by the mortgage without first correcting the mistake. Power is conferred upon the County Court to enforce specific performance, but this does not include the correction of mistakes, 105 N. Y., 658.

That portion of the judgment

appealed from reversed, with leave to proceed in the Supreme Court for relief, etc.

Opinion by *Corlett, J.*; *Haight, J.* concurs; *Bradley, J.*, dissents.

PRACTICE. LACHES.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

In re estate of Andrew Hood.

Decided July, 1887.

A motion to correct an irregularity in a decree must be made promptly and before taking other proceedings in the case.

Where the party aggrieved appealed from the decree relying on such irregularity for reversal and allowed two years to elapse before making his motion, *Held*, That he was guilty of laches.

Appeal from order of surrogate denying motion to set aside a decree made on a proceeding to compel appellant to account as executor on the ground of irregularity in that no findings of fact or conclusions of law were made or filed.

Appellant appealed from the decree, relying on such irregularity for reversal, and two years were allowed to elapse before making this motion.

Held, That assuming that a failure to make findings is an irregularity, the general rule is that a party aggrieved must move promptly and before taking other proceedings in the case. That appellant's conduct was gross laches and ought not to be encouraged.

It is not necessary to determine what provision of the Code is applicable to the fact disclosed on

this motion, as we think, under all the circumstances, it was discretionary with the surrogate either to grant or deny the motion. And such discretion is not reviewable in this court. 41 Hun, 613.

Order affirmed, with costs.

Opinion by *Pratt, J.*; *Barnard, P.J.*, concurs.

SALE. DAMAGES.

N. Y. COURT OF APPEALS.

Gray, *respt.*, v. Walton, *applt.*

Decided Oct. 28, 1887.

Plaintiff purchased certain goods at auction which were to be delivered on payment on or before May 1. The bill of items was wrong and plaintiff offered to pay the correct amount, but was put off till May 2, when the matter was settled, payment made and the money turned over to defendant, the owner. *Held*, That defendant was bound to deliver the goods or put them where plaintiff could get them.

In an action for refusal to deliver such goods the measure of damage is the value of the goods on the day the delivery should be made; the price they brought on the sale may be considered, but is not strong evidence of the value, nor is the recovery limited to the purchase price.

This action was brought to recover damages for the non-delivery of chattels purchased at an auction sale of the furniture and property of a hotel in April, 1883. The terms of sale did not relieve the defendant from the obligation to deliver the property purchased by plaintiff, unless he failed to complete the purchase by paying for and removing it before May 1. Plaintiff did not pay for the goods until May 2, but his default was occa-

sioned by the neglect of defendant to correct a bill of items in time to enable plaintiff to comply with the terms of sale. It appeared that two washing machines which were charged in the bill at \$100 were struck off for \$50; that plaintiff repeatedly called upon the auctioneer before May 1 and expressed his readiness to pay the correct amount, but was put off from day to day until May 2, when the controversy was settled and plaintiff paid the bill to the auctioneer, who paid the money over to the defendant.

Joseph A. Shoudy, for *applt.*

Jacob F. Miller, for *respt.*

Held, That plaintiff having offered to comply with the terms of sale was not in default, and defendant having on the 2d of May accepted payment was under obligations to deliver the goods on the premises or at least to put them within the power or under the dominion of plaintiff, notwithstanding the expiration of the period for the removal fixed by the contract. Story on Sales, § 310.

Also held, That it was not necessary for plaintiff to tender the true amount due before the 1st of May.

The court charged that plaintiff was entitled to recover the value of the goods on the 2d of May, if entitled to recover at all, and that the jury in determining the value might consider the price the goods brought on the sale, and he refused to charge that the recovery was limited to the purchase price, or that the purchase price was strong evidence of the value.

Held. That the charge was correct. 42 N. Y., 46; 20 id., 499; 76 id., 124.

Judgment of General Term, affirming judgment for plaintiff on verdict, affirmed.

Opinion by *Andrews, J.* All concur, except *Ruger, Ch. J.*, not voting.

LIMITATION. JUDGMENT.

N. Y. COURT OF APPEALS.

In re accounting of Kendrick, admr. Visscher et al., exrs., *respls.*, v. Wesley, *applt.*

Decided Oct. 11, 1887.

Where a claim on a judgment is barred by the statute when presented no acknowledgment or new promise by an administrator is available to revive the debt against the other creditors or next of kin. The extension of eighteen months mentioned in § 508 does not apply to judgments.

A statement of the claim in the administrator's account accompanied by a statement that it is disputed is not an acknowledgment of the debt. Nor is an admission thereof in answer to a claim by a stranger sufficient to rebut the presumption of payment.

Affirming S. C., 26 W. Dig., 315.

Upon the petition by K. for the settlement of his accounts as administrator, one W. claimed a preference as a judgment creditor. His judgment was recovered May 29, 1863. The petitioner's intestate died Jan. 9, 1883. His administrator qualified Feb. 9, 1883. W. presented his claim March 27, 1884. It was not claimed that any payment had been made upon it, or any acknowledgment of a continuing indebtedness given before such presentation.

S. H. Randall, for *applt.*

H. G. Atwater, for *respts.*

Held, That the claim was barred by the statute when presented, and no acknowledgment or new promise by the administrator would have been available to revive the debt against the other creditors or the next of kin of the intestate. 36 N. Y., 88.

By § 336 of the Code a judgment is presumed to be paid and satisfied after the expiration of twenty years from the time when the party recovering it was first entitled to a mandate to enforce it, and this presumption is conclusive except as against a person who, within twenty years from that time makes a payment or acknowledges an indebtedness of some part of the amount recovered. The extension of eighteen months mentioned in § 403 of the Code applies only to those sections following § 380, which limit the time for commencing certain actions, and are added to the times limited in those sections for bringing the actions. There is no provision in the Code which under any circumstances extends the time within which an acknowledgment or payment must be made in order to have the effect of rebutting the otherwise conclusive presumption that after the lapse of twenty years a judgment has been paid and satisfied.

On Feb. 27, 1884, the executors of V., the respondents here, presented a petition that the administrator be decreed to pay a judgment recovered by their testator against his intestate Dec. 29, 1865. The administrator in an answer

verified March 27, 1884, and filed March 28, 1884, set up that the judgment recovered by the appellant on May 29, 1863, was entitled to priority.

Held, That this was insufficient to revive the appellant's judgment. An admission or acknowledgment made under such circumstances to a stranger is not effectual to rebut the presumption of payment, or to revive a debt barred by the statute of limitations. 8 N. Y., 362; 9 id., 85; 98 id., 217.

The administrator's petition for the settlement of his accounts contained among the names of persons interested in the estate as creditors, legatees, next of kin or otherwise, the name of the appellant as a judgment creditor. The petition did not specify the amount of the judgment, the date of its recovery or that any amount was due thereon. The account which was verified the same time as the petition, set forth the appellant's judgment and stated the claim was disputed by the administrator.

Held, That this did not amount to a written acknowledgment of the debt.

On the hearing before the surrogate in Jan., 1885, an order was made, on motion of the administrator, amending the account by striking out the statement that the appellant's judgment was a disputed claim. Prior to said motion the respondents had filed objections to the allowance of appellant's judgment.

Held, That it was out of the power of the administrator at that stage of the proceedings to bind

the contesting creditors by acknowledging the appellant's judgment as a subsisting claim.

Order of General Term, affirming decree of surrogate, affirmed.

Opinion by *Rapallo, J.* All concur.

DEED. MORTGAGE.

N. Y. COURT OF APPEALS.

Gilbert v. Deshon et al., *appls.*,
Westerfield, *respt.*

Decided Nov. 29, 1887.

W. executed a deed to D. of her share in certain land for the purpose of enabling him to raise money to pay taxes on lands of her husband held by D. as security for claims against the husband. She delivered it to her husband to give to D. She afterward fully paid said taxes to D. *Held*, That the deed was an equitable mortgage, and the condition being fulfilled no title or lien on the property was left in D.

This action was for a partition of real property belonging to W. in his lifetime. All of the parties except the appellants were descendants of W. The respondent was allowed to come in and defend. Her answer admits that she executed a deed to the appellant of her share of the estate, which she delivered to her husband, the deed being executed for the specified purpose of enabling the appellant to borrow on it enough to pay the then arrearages of taxes on a part of her husband's real property in appellant's hands and name, held as security for his claims against the respondent's husband. Neither party claimed that the conveyance was absolute. It appeared that the respondent fully paid to

the appellant the taxes, the payment of which the deed was executed to secure.

N. C. Moak, for applt.

Wm. H. Secor, for respt.

Held, That the deed to appellant was an equitable mortgage, and the condition thereof having been fulfilled, no title to or lien upon the property was left in him; that the respondent's husband in the transaction with the appellant stood, both in appearance and in fact, as his wife's agent to deliver the deed upon her terms and in accordance with her directions; that the deed, although absolute on its face, having been given and accepted as an equitable mortgage, it was the duty of the grantee to correctly ascertain the conditions on which it was executed and entrusted to the husband, and the grantee in accepting the deed could not change the conditions upon which it was entrusted to the husband for delivery, or safely assume that he was authorized to determine what they should be.

Judgment of General Term, affirming judgment for respondent, affirmed.

Opinion by *Finch, J.* All concur.

PARTIES.

N. Y. COURT OF APPEALS.

The Merchants' Loan & Trust Co., *applt.*, v. *Clair, respt.*

Decided Nov. 29, 1887.

In this action on a note plaintiff proved an order appointing a receiver of its prop-

erty on the ground of its insolvency and the statute of New Jersey providing for such appointment when any corporation shall be dissolved. *Held*. That the action could not be maintained in the name of the corporation, it appearing that it no longer had a corporate existence.

Affirming S. C., 21 W. Dig. 517.

This was an action upon a promissory note. Upon the trial, after making a *prima facie* case for recovery and proving its due incorporation in the State of New Jersey, plaintiff put in evidence an order of the Court of Chancery of said State appointing a receiver of its corporate property, which order was founded upon a petition alleging the plaintiff's insolvency, and as it had suspended its business for want of funds. This order directed the receiver to collect and turn into money the assets of the corporation and pay the proceeds to its creditors. For the apparent purpose of showing the law which authorized the order, plaintiff read in evidence the statute of New Jersey providing for the appointment of a receiver when any corporation shall be dissolved. At this point plaintiff rested and the defendant moved to dismiss the complaint, which motion was granted.

John A. Mapes, for applt.

Delos McCurdy, for respt.

Held, No error; that the only admissible inference from the evidence introduced by the plaintiff was that the receiver had been appointed under the New Jersey law after or upon the dissolution of the corporation, and that plaintiff had no longer a corporate existence.

Judgment of General Term, affirming judgment for defendant, affirmed.

Per curiam opinion. All concur.

CREDITOR'S ACTION. PAYMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Joseph Kittel, *applt.*, v. Richard S. Jones, *impl'd.*, *respt.*

Decided Oct. 26, 1887.

Where in a creditor's action to set aside conveyances made by the debtor to several grantees one of said grantees settles and obtains a discontinuance as to his property on payment of a sum of money which is not specifically applied, said sum must be applied on the plaintiff's judgment.

Appeal from order sustaining exceptions to referee's report and directing the deduction of a sum of money from the judgment on which the action is brought.

Action brought by a judgment creditor to set aside conveyances made by the judgment debtors. Plaintiff recovered a judgment for \$618 in 1875, and brought this action against the debtor and several grantees. After judgment had been obtained and reversed at General Term, one of the defendants, H., made a settlement with plaintiff, including one piece of the real estate in controversy, on which he paid the sum of \$600, which was not specifically applied on the debt nor otherwise. The action was discontinued as against him and proceeded against the

other defendants. An interlocutory judgment was rendered declaring the conveyances void and directing the defendants to convey to a receiver and account for the rents, and among other things the referee was directed to take proof whether any payment had been made on plaintiff's judgment and the amount due thereon. The referee reported against the application of the \$600 on the judgment. The court sustained the exceptions to the report and directed the deduction of said \$600.

B. G. Hitchings, for *applt.*

Jas. R. Angel, for *respt.*

Held, No error. It was not necessary that the payment should have been avowedly made upon the judgment to justify this disposition of it, for it was made in the action brought to recover the debt out of the property of the judgment debtors. And this money was realized from one of their grantees and in effect from their property, for it would not have been paid by H. otherwise than to protect the property they had conveyed to him against a sale under the judgment. It was not requisite that the judgment creditor should receive the money directly from the debtors to entitle them to insist on it as a payment. As long as it was received from their grantee and for the purpose of quieting his title to the property they had conveyed to him that was sufficient. It was the object of the action to obtain payment of the judgment, and whatever sum was realized by means of the action was so much to be

applied upon and deducted from the judgment. To maintain such an action a judgment is indispensably necessary, and one that has not been satisfied, and it can only be maintained against the grantees of the judgment debtors for the recovery of whatever may remain unsatisfied and undischarged recovered by the judgment. This sum was so much realized by the creditor which the debtors had the right to insist should be applied toward the payment of the judgment. Whether a payment by a stranger will operate as a discharge of the indebtedness on which it may be made is a point that has been left in doubt by the more recent consideration of that subject in this State. 84 N. Y., 543. But even if it could not the principle is inapplicable to this case, for this payment was not made by a stranger, but by a person against whom it was insisted that the judgment should be enforced so far as he had received the property referred to in the action from the debtors.

The order directed the deduction of a proportionate amount from the allowance and charged plaintiff with the referee's fees. This was claimed to be error, and that commissions of the receiver should have been deducted.

Held, That the directions were right. The settlement through which the \$600 was obtained preceded the recovery of judgment in this action. At that time the only obligation which plaintiff was entitled to enforce was the original judgment recovered

against the debtors themselves, and this sum of money was applicable alone to that judgment. Its effect was to reduce it by the sum of \$600 and as the allowance depended upon the amount of the judgment in this action which was afterward directed, and would have been diminished if the payment had been properly applied, it was entirely right to make the deduction directed. The evidence and proceedings given upon the hearing related to the dispute concerning the application of this \$600. The other duties of the referee are of a quite formal character, certainly requiring but little time or attention, and if a discrimination should have been made as to the amount of fees applicable to each of the inquiries the application for that purpose should have been brought to the attention of the court at Special Term. The receiver was entitled to no commission on this sum of money. It was not received by him, and could not have been as his appointment was not made until after the money had been paid.

If there were costs attending the litigation that were not recovered in the ultimate disposition of the action that circumstance did not confer on plaintiff any right to divert the money from the object to which the law and justice of the case applied it, and that was the payment of so much of the judgment on which this action depended.

Order affirmed, with costs.

Opinion by *Daniels, J.*; *Bartlett, J.*, concurs.

COMMON CARRIERS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

James H. Dunham et al., v. The Boston & Albany RR. Co.

Decided Oct. 26, 1887.

A common carrier is not only liable while the property is in course of transit, but continues liable for such a reasonable period of time as will enable the consignee after notice to effect the removal of the goods with reasonable diligence.

Motion by defendant for new trial on exceptions ordered heard at General Term.

Plaintiffs delivered a quantity of cases of flannels to a railroad company in New Hampshire to be carried to a station on defendant's line and delivered to a dye works. Defendant received them at Worcester from said railroad company and transported them to said station and notified the consignee. The cars containing them were placed on a side track near the station, and the consignee immediately commenced removing the goods, using all the trucks in his employ, one double and two single ones, and continued doing so until time for knocking off work at night, leaving a car load and a half which they had been unable to remove. In the night a fire took place which burned the station and one of the cars which the men were unable to remove and which contained eleven cases of the flannels. In this action for said cases of goods the court held defendant liable and directed a verdict for plaintiffs.

Miller & Macfarlane, for deft.

Kopper & Jenks, for plffs.

Held, No error. Ordinarily and generally it has been held that the carrier is not only liable while the property may be in the course of its transit or carriage, but that it continues to be so for such a reasonable period of time as will enable the consignee after notice of the arrival of the goods with reasonable diligence to effect their removal. This is the principle on which the courts in other States have acted in determining the extent of the liability of the carrier. And under this principle, as the consignee observed proper diligence in his endeavors to remove the goods after their arrival, and were unable to do so by the observance of that diligence before the destruction of this residue by the fire, defendant was properly held liable for the value of the goods. This legal principle has been held to be, and followed as the law in the State of New Hampshire where these goods were delivered to the first carrier and from which they were received by defendant. 32 N. H., 523. The contract of the carrier was there entered into, and it was under that contract the goods were transported from the place where they were first delivered to the place of business of the consignee. And the force and effect given to such a contract of shipment and carriage by this decision is to support the rule which has already been mentioned. And it has been followed in 18 Wis., 345; 27 id., 541; 36 id., 689; 16 Kas., 333. And so firmly settled has this rule

been considered to be, that in *Faulkner v. Hart*, 84 N. Y., 413, it was held to control the case of a shipment in which the goods were to be and were delivered in the State of Massachusetts, the court as the case depended on the principles of commercial law declining to follow the rule indicated by the decisions in that State.

Norway Plains Co. v. RR., 1 Gray, 263; *Rice v. Hart*, 118 Mass., 201, and *Reed v. Richardson*, 98 id., 216, not followed.

Motion denied and judgment directed for plaintiffs.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Brady, J.*, concur.

SPECIFIC PERFORMANCE. TITLE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Sigmund J. Seligman, *respt.*, v. Jonas Sonneborn, *applt.*

Decided Oct. 26, 1887.

A mortgage given by B. was foreclosed, service on him being made by publication, and the executors of the mortgagee purchased on the sale. It being claimed that B. died before the foreclosure, the executors again foreclosed by advertisement against the heirs of B., satisfied the mortgage out of part of the mortgaged property and conveyed the balance to said heirs through whom plaintiff obtained title. *Held*, That plaintiff's title was good.

Appeal from judgment entered on report of referee, decreeing specific performance of a contract for the purchase of land.

One B. in 1860 executed a mortgage on five lots of land to one C.,

who in 1862 began suit to foreclose the same. The summons was served on B. by publication. C. died and his executors were substituted and bid in the property on the sale.

Thereafter and in 1868 the executors foreclosed the mortgage by advertisement against the heirs of B., and sold enough property to satisfy the mortgage, leaving unsold the lots in question here, the executors conveyed these lots to said heirs, and subsequently in an action of partition between said heirs they were sold to plaintiff who received the referee's deed therefor.

Defendant refused to accept a deed for the premises when tendered on the ground that plaintiff could not convey a good title. The referee found that B. died before the commencement of the foreclosure action against him; that the judgment in said action was void and the executors obtained no title thereunder; that the lots in question are released from the mortgage; that on the death of B. the title descended to his heirs; that plaintiff acquired no title under the judgment in the action of partition, but that he obtained a good title from said heirs by their conveyance to him in 1872.

Stephen Pfeil, for *applt.*

Richard S. Newcombe, for *respt.*

Held, That plaintiff's title is valid, even if B. was not dead at the time of the institution of the C. foreclosure suit, for the executors had the right to become pur-

chasers at the sale under the judgment in that action, 20 Hun, 537, and could afterward convey a good title to their grantees. 95 N. Y., 65. And if B. died before the foreclosure suit was begun, as has been found by the referee, the land was subsequently released from the obligation of the mortgage by virtue of the foreclosure by advertisement, in which it did not become necessary to sell these premises in order to realize the whole amount due, and the title, therefore, was in the heirs of B. unencumbered by the mortgage when they conveyed the land to plaintiff.

Judgment affirmed, with costs.

Opinion by *Bartlett, J.*; *Van Brunt, P.J.*, and *Brady, J.*, concur.

LIMITATIONS. ACKNOWLEDGMENT.

N. Y. COURT OF APPEALS.

Manchester et al., *respts.*, v. Braender, *applt.*

Decided Nov. 29, 1887.

When one person delivers to another orders on a third person to pay money to the one to whom they are given when certain work has been performed, such orders constitute an acknowledgment in writing of the debt within the statute of limitations and continue the debt for six years from their date.

Where the party giving such orders by his own act in abandoning the work prevents the payment of the orders he thereby leaves himself subject to the obligation of paying the debt.

This action was brought to recover for masons' building mate-

rials sold by the plaintiffs to the defendant. It appeared that defendant had entered into a contract with one H. to do the plastering work on certain houses which H. was building. Plaintiff delivered the materials to H. under a verbal agreement. They were to be paid for in cash. A portion was paid for and in June, 1876, there remained unpaid a balance of \$1,058.85. About this time H. became embarrassed and abandoned the work. To secure the plaintiffs defendant gave them three orders in writing directed to H.; one requested H. to pay plaintiffs \$120 when certain of the buildings in question were patched and to deduct the same from defendant's account according to contract; another was to pay them \$756 as soon as certain of the buildings had the white mortar all on except patching, and another was for \$160 when said buildings were patched. A few days after defendant abandoned his work under the contract and the orders were never paid. It was proved orally that defendant owed plaintiffs the amounts specified in said orders, and that they were given to secure payment of the debt.

Philip L. Wilson, for *applt.*

David Thurston, for *respts.*

Held, That the orders constituted an acknowledgment in writing of the debt within § 110 of the Code, and continued the debt for the period of six years from that date.

The promise to be inferred from the orders was not conditional in the sense that the debt was to be

paid only out of the fund in the hands of the drawee. At most there was an appropriation of that fund for the payment of the debt, 18 N. Y., 558; 66 id., 352; that as defendant by his own act in abandoning the contract with H. prevented the payment of the orders, he left himself subject to the general obligation of payment resting upon all debtors.

A writing in order to constitute a sufficient acknowledgment of a debt to take it out of the statute must recognize an existing debt and should contain nothing inconsistent with an intention on the part of the debtor to pay it. Oral evidence may be resorted to as in other cases of written instruments in aid of the interpretation. Oral evidence is admissible to identify the debt and its amount, or to fix the date of the writing relied upon as an acknowledgment when these circumstances are omitted, 73 N. Y., 189; 3 Tyrw., 450; 3 Bingham N. C., 883, or to explain ambiguities. 1 Smith's L. Cases, 960.

When one delivers to another an order on a third person to pay a specified sum of money to the person to whom the order is given, the natural import of the transaction is that the drawee is indebted to the drawer in the sum mentioned in the order, and that it was given to the payee as a means of paying or securing the payment of his debt. It implies the relation of debtor and creditor between the parties to the extent of the sum specified in the order, and a willingness on the part of the debtor to pay the debt. The transaction

may be consistent with a different relation and another purpose, but in the absence of explanation that is its natural and ordinary meaning. 1 N. Y., 377.

Judgment of General Term, affirming judgment for plaintiffs on report of referee, affirmed.

Opinion by *Andrews, J.* All concur.

BANKS. CERTIFICATION.

N. Y. COURT OF APPEALS.

Lynch, *respt.*, v. The First Nat. Bk. of Jersey City, *applt.*

Decided Oct. 18, 1887.

Where a bank certifies a check drawn to the maker or order while still in his possession, such certification operates as a promise to pay it on presentation bearing the drawer's indorsement, and the bank cannot be made liable to a third party thereon by a transfer of the check without such indorsement.

This was an action to recover the amount of a check which was delivered to plaintiff by one W. in payment for a diamond. The check was dated Jersey City, Jan. 1, 1883, and was payable to the maker or order. It was certified by the defendant, at the request of the drawer, while still in his possession and while he had funds in the bank.

Hamilton Wallis, for *applt.*

Abraham Kling, for *respt.*

Held, That as there was no evidence of a contract between W. and plaintiff whereby any transfer of the deposit in the bank was intended to be made beyond that which would follow the mere de-

livery of the check, this action could only be supported by proof that all of the conditions upon which the authority of the bank to pay the check was made to depend had been performed, 76 N. Y., 357; that the certification by the defendant operated as a promise to pay the check upon presentation at the bank named bearing the drawer's indorsement; that defendant had a right to make such a contract, limiting its liability to an order properly indorsed by the drawer or his payee, and the drawer had the right to impose upon the defendant that it should only pay out his money on a check indorsed by himself or its payee. 46 N. Y., 82; 17 Wend., 94; 14 N. Y., 623; 19 id., 125; 28 id., 425; 67 id., 458; 89 id., 418; 100 id., 56; 83 id., 318; 21 id., 490.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed, and new trial ordered.

Opinion by *Ruger, Ch. J.* All concur, except *Earl, J.*, not voting.

WILL. CODICIL.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Aaron Newcomb et al, *appls.* v. Edward Webster et al, *respts.*

Decided Oct. 1887.

While a subsequent will does not revoke a former will unless it so declares, or is inconsistent with it, there is a different rule of construction to it and a codicil. The latter is supplemental to and is a republication of the will, and the rule of construction requires, if it can fairly be done, that it be construed in connection with

the will, and in harmony with its provisions; and the fact that it contains a residuary clause which covers all the estate not specifically disposed of cannot have the effect to supersede the specific bequests and devises of the will not inconsistent with the codicil.

Appeal from judgment entered on decision of Monroe Special Term.

Action for the construction of the will and codicil of Angelina B. Walker, deceased. It appears that she made her will of date April 23, 1881, and a codicil of date of May 20, 1884; that she died June 7, 1884, and both will and codicil were admitted to probate. By the will she gave, 1, to her sister, Olive J. Hatch, the use during life of a house and lot, and directed sale after her death, and the division of the proceeds between persons named; 2, to Anna L. Newcomb the use during life of another house and lot subject to the payment by her of five dollars monthly to another, and directed a sale on her death and the division of proceeds between the children of Anna L. Newcomb; 3. She directed the sale of another house and lot, and out of the proceeds the erection of a monument on her lot in Mt. Hope, and that \$100 be placed in the hands of the commissioners of the cemetery as a perpetual fund, the income of which to be expended to keep the monument in repair. And that the residue of the fund produced by the sale, after the payment of legacies amounting to \$1,200, to be divided between several persons named, among whom are Hubert Herrick and Emiline Soper; 4.

She directed the sale of her homestead and the division of the avails between six children of George Walker. 5. To Robert P. Newcomb her piano, and to five nieces named all her household furniture and "all the residuary interests and estate." And nominated the plaintiff Aaron Newcomb and the defendant Edward Webster as executors, to whom letters were afterward issued.

By the codicil commencing as follows; "I * * * do make, publish and declare this first codicil to my last will and testament, hereby revoking so much of said will and testament as is inconsistent with the provisions of this codicil," testatrix gave as follows: 1, to the commissioners of Mt. Hope \$100, as a perpetual fund, the interest of which, to be "annually expended to keep the lot in said Mt. Hope belonging to my late husband Robert Walker and my brother Perry Hodges." 2. To the Rochester Home for the Friendless, \$150. 3. To the Frank St. M. E. Church of Rochester, \$500. 4. To the Rochester Orphan Asylum, \$300, to be expended for a specific purpose; 5. To Hubert Herrick when arriving at the age of twenty one years, and if he does not live to that age, to his mother, \$500. 6. To her sister Emeline Soper and Olive Hatch, each \$500. 7. To the six children of George Walker, each \$200. 8. To her nieces, among whom is Anna Newcomb, all the rest, residue and remainder of her estate, both real and personal.

It appeared that after making

the will, and before the codicil was made, the testatrix had sold the house and lots, the use of which she had devised to Anna L. Newcomb, and the house and lot the proceeds of which she had directed to be divided among the six children of George Walker. The trial court determined that the residuary and no other clause of the will was revoked by the codicil, and that all the other provisions remained effectual, except those disposing of the life estate and avails of the two houses and lots which were sold by the testatrix, and that by such sales those clauses were revoked. Plaintiffs appeal.

Turk & Barnum, for appls.

Roy C. Webster, for respts.

Held, That while a subsequent will does not revoke a former one unless it so declares or is inconsistent with it, 3 Barb. Ch., 158, there is a difference in the rule of construction applicable to it and to a codicil; because the latter purports to be supplemental to it and is a republication of the will, while the subsequent will may be treated as an independent testamentary instrument, and therefore the former must, if it fairly can be done, be construed in connection with the will, and in harmony with its provisions; while the subsequent will, not necessarily subordinate in its purpose to the former will, may be given a more comprehensive effect when its provisions permit by way of testamentary disposition of the estate of the testator. Yet inconsistency to give it that effect must exist between the two

wills, and the latter operates as a revocation *pro tanto* only, when the repugnancy is not coextensive with the provisions of the former will.

That in view of the rule of construction which is applicable and must be applied to a codicil, the fact that it contains a residuary clause, which covered all the estate not specifically disposed of, cannot have the effect to supersede the specific devises and bequests of the will, not in terms inconsistent with the codicil. In this view of the case there seems to have been no error in the conclusion of the trial court.

Judgment affirmed.

Opinion by *Bradley, J.; Smith, P.J., and Childs, J.*, concur.

TOWNS. BRIDGES. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Reuben E. Phillips, *applt.*, v. The Town of Macedon, *respt.*

Decided Oct., 1887.

In an action against a town to recover for injuries sustained by the fall of a wooden bridge, caused by the breaking of a decayed or rotten cord or stringer, it was shown that the bridge was in an unsafe and dangerous condition and had been so for some period of time; but it appeared that the highway commissioners employed an expert to examine, inspect and test the bridge, its cords, stringers and beams, and that he made such examination a few days before the accident, in their presence, and pronounced the bridge safe and sound. *Held*, That as it was apparent from the evidence that if a proper examination had been made and the proper tests applied the defect would have been discovered, the jury were war-

ranted in coming to the conclusion that the expert and commissioners failed in this particular, and that the town was liable.

Appeal from order setting aside verdict and granting a new trial.

Action to recover damages occasioned by the fall of a wooden bridge, over which plaintiff was driving in a buggy, the horse going on a walk. There was a span of sixty feet; width of roadway, twelve feet. There were two cords or stringers eight by twelve inches, and each thirty feet in length, which together spanned the stream. On top of these stringers there was an upper cord or straining beam. These cords were held up by six needle beams, sustained as in the ordinary truss bridge. One of these string pieces or cords broke at a point from eight to twelve feet from the northeast abutment of the bridge, directly over the northerly needle beam. The cord that broke was of hemlock timber, and there was some evidence that it was originally poor timber. Witnesses who examined it immediately after the accident testified that the northerly end of the broken cord for twelve feet was rotten, with the exception of a shell of sound timber one inch in thickness upon three sides of it. Upon the lower side it was decayed to the surface. There was a small knot in the inside of the timber at the place where it broke.

The bridge stood about twelve years. One witness, G., testified that he was in swimming under the bridge a year before the acci-

dent and discovered that the sill was rotten; it was decayed about twelve feet from the shore; that the bridge was boarded on both sides, and standing off with a side view you could not see the rotten places. A witness testified that he repaired the bridge three years before the accident, Mr. Gage, one of the road commissioners assisting him; Gage said that he didn't think the bridge would last over three years, and that there would have to be a new one; it was spoken of while the commissioners were there; it was said the bridge was in bad shape; it sagged in the middle four or five inches.

Defendant showed that an expert inspected, examined and tested the bridge a few days before the accident and pronounced it safe. He testified as to the manner in which he tested the bridge—tapping and pounding the cords and beams, boring the needle beams, etc. The jury found for plaintiff.

J. Gillette, for applt.

John H. Camp, for respt.

Held, That the evidence was sufficient to show that the bridge at the time it fell was in an unsafe and dangerous condition, and that it was no defense to the town that an expert had been employed to examine and test the bridge a few days before the accident and had pronounced it sound and safe.

Much of the evidence given on the part of plaintiff was controverted by defendant, making it a question for the jury to determine the reliability of the evidence. It became a question of fact whether

defendant was guilty of negligence in not repairing the bridge, unless the fact that the highway commissioners caused the bridge to be inspected a few days before the accident by a competent person, who thought it was in a safe condition, is any defense.

If the testimony of plaintiff's witnesses be true, the end of the cord that broke was, for eight to twelve feet from the abutment, with the exception of a shell an inch thick, entirely decayed and rotten. The expert says that he applied certain tests and did not discover the cord was rotten. There was considerable proof that the timber was in such a condition that if the tests which he said he made had been applied its true condition would have been disclosed. He said that he examined the bridge from below and did not discover any evidence of decay. If the witness G. recollected the facts correctly, the expert must have failed to get a view of the cord from below. The commissioners were present and witnessed this examination of the bridge by the expert. One of them testified that there would have been no trouble in boring into the stick and ascertaining if it was rotten. He saw the expert bore into the needle beams to see if they were unsound and that he neglected to subject the cord to the same test. It is apparent that the examination given the bridge by the expert did not disclose its defective condition, and the jury evidently came to the conclusion that if a proper examination had been made

its true condition would have been discovered, and that the expert and the commissioners failed to make such examination. 14 Hun, 179; 44 N. Y., 125; 40 Hun, 192.

The jury concluded that the commissioners failed to come up to their standard of duty as established by these adjudications. If they had no funds with which to make repairs, it was their duty to close the bridge. 5 Hun, 612.

A new trial will not be granted upon the ground that the verdict is against the evidence. 63 Barb., 21; 64 id., 299; 16 Hun, 415; 23 W. Dig., 375.

Order reversed.

Opinion by *Lewis, J.; Smith, P.J., Barker and Bradley, JJ.*, concur.

LEASE. TRIAL.

N. Y. SUPERIOR COURT. GENERAL TERM.

Charles Edwards, *respt.*, v. Alexander McLean, *applt.*

Decided Nov. 21, 1887.

When a lease is executed in counter parts, by one of which the house is to be let "to be furnished substantially as it now is," and by the other, "to be furnished as it now is," the word "substantially" will be implied in the latter.

That the house let was infected when the term began is no defense to action for rent, it appearing that the infection occurred after the lease was made, without the landlord's fault, and there being no special covenant by him.

Appeal from judgment and from order denying motion for new trial.

Action for rent of a dwelling house let by plaintiff to defendant.

By the lease in plaintiff's possession the house was let "to be furnished substantially as it now is." By the counterpart in defendant's possession "it was let to be furnished as it now is."

At the time of making the lease the house was, to the knowledge of both parties, occupied by a tenant of plaintiff.

C. F. McLean, for *applt.*

W. Edwards, for *respt.*

Held, That by legal implication the counterpart held by defendant expresses what is expressed by the word "substantially" in the lease held by plaintiff.

One of the defences to the action was that the requisite amount of furniture was not in the house.

On the trial, both sides litigated this question. At the close of plaintiff's case defendant moved for a dismissal of the complaint. At the close of the proof on both sides, the judge submitted that question to the jury upon the evidence given on both sides with the instruction, requested by defendant, "that if the jury believe that the house as offered to the defendant, June 1, 1885, was not furnished substantially as it was when the lease was executed, they must find for defendant." No request for a direction of a verdict for defendant was made.

Held, That defendant could not complain of the disposition of the case, because at the time of the motion to dismiss plaintiff had made out a case for the jury; and because the submission to the jury was acquiesced in by defendant.

Another defense was that the

premises had been infected; this was overruled.

Held, No error; it appearing that the infection occurred without plaintiff's fault long after the making of the lease, though before the term began, and there being no covenant as to the fitness of the premises for occupation as a dwelling.

Judgment and order affirmed, with costs.

Opinion by *Freedman, J.*; *Sedgwick, Ch. J.*, concurs; *Truax, J.*, dissents.

WILL. DESCENT.

N. Y. SUPERIOR COURT. GENERAL TERM.

Benjamin Webb et al., admrs.,
v. David B. Sanford.

Decided Nov. 21, 1887.

When the will gives to a devisee a life estate in real property with a limited power of disposition, *e. g.*, among the devisee's relations, upon the death of such devisee without any exercise of this power the heirs of the testator hold the fee free of the power.

On construction of the provisions of the will in question, *Held*, That it did not vest a fee in testator's wife (the devisee), but only a life estate with a limited power of disposition.

Questions submitted to the court upon agreed state of facts under § 1279, Code of Civil Procedure.

One Benjamin Webb made and published his last will dated June 11, 1840, in due form of law to pass real estate. By this will he gave his wife all his household furniture and certain other property, and the use and improvement of all his real estate during

her natural life for her support. If that should not be sufficient she was to take so much of said real estate as necessary for her support. He then directed that one-third of his real estate be at the disposition of his wife for distribution among her own relatives. The remaining two-thirds of his real estate he gave and bequeathed to certain of his relatives who were named in the will, and then directed that at the decease of his wife his real estate be sold and divided and paid over as above directed. Said will was duly admitted to probate on or about the 23d day of Sept., 1840. The wife of said Webb survived him, and did not die until 1870. She died intestate, without having made any disposition among her relatives of the one third of said testator's real estate referred to in said will.

The question which is submitted to the court is as follows: Did the one-third of the real estate of the said Webb as to which the said will provided as follows: "It is my will that one-third of my real estate be at the disposal of my wife for distribution among her own relatives," the widow of said testator having died without making any distribution of the same, descend to the heirs of the said Webb, the testator above named!

Henry B. B. Stapler, for plffs.

Charles W. Dayton, for deft.

Held, That while it is well settled that a valid executory devise cannot at common law be limited after a fee, upon the contingency of the non-execution of an absolute power of disposition vested in

the first taker, it is to be noticed that the first taker under the will of Mr. Webb did not have an absolute power of disposition. Her power of disposition was limited to the persons therein named, namely, her relatives; and a disposition made otherwise than among her relatives would have been illegal and void. For this reason this will does not fall within the rule laid down by the Court of Appeals in *Van Horne v. Campbell*, 100 N. Y., 287. We are of the opinion that the will gave to the wife a life estate in the property with a limited power of disposition, to be exercised by her in the method provided in the will, and that upon her death before any exercise of this power of disposition the heirs of the testator held the fee freed from the power.

Judgment for plaintiffs for amount mentioned in consent.

Opinion by *Truax, J.*; *Sedgwick, Ch. J.*, and *Freedman, J.*, concur.

NEGLIGENCE.

N. Y. SUPERIOR COURT. GENERAL TERM.

Daniel Eades, *applt.*, v. Heman Clark et al., *respts.*

Decided Nov. 21, 1887.

In an action for damages for injuries caused by the falling of a rock from the roof of a tunnel in which plaintiff was at the time employed by defendants; the contractors engaged in the construction thereof, alleged to be due to defendants' negligence, the only evidence as to plaintiff's freedom from negligence was his own testimony to the effect that he

could not say whether he had or had not noticed the peculiar and dangerous condition of that portion of the roof which fell upon him. *Held*, That the complaint was properly dismissed, the burden of showing his own freedom from negligence resting upon plaintiff.

Appeal from judgment dismissing the complaint.

Action for damages alleged to have been caused by defendants' negligence. It appeared that defendants were contractors engaged as such in the construction of the new aqueduct for the supply of water to New York City; that plaintiff was employed by them upon said work, and that the duties of his employment called him in and out of a certain tunnel, then in progress in the course of said work; that while so engaged in said tunnel plaintiff was injured by the falling of a loose piece of rock from the roof of the tunnel.

It also appeared that the peculiar and dangerous condition of the roof had been noticed by others prior to the happening of the accident.

Plaintiff contended that defendants were negligent in not timbering said roof and otherwise. The only evidence on the point of plaintiff's freedom from contributory negligence was his own testimony to the effect that he could not say whether he had or had not noticed the peculiar and dangerous condition of that portion of the roof that fell on him.

W. T. Daniel and *R. Sewell*, for *applt.*

E. T. Lovatt and *Homer A. Nelson*, for *respts.*

Held, That the complaint was

properly dismissed. The burden of proving his own freedom from negligence is as much a part of plaintiff's case as is the burden of proving defendants' negligence. And if he fail to prove either one or the other he has not shown a cause of action. 58 N. Y., 248; 78 id., 480; 84 id., 56; 92 id., 658.

Judgment affirmed, with costs.

Opinion by *Truax, J.*; *Sedgwick, Ch. J.*, and *Freedman, J.*, concur.

CONTRACT.

N. Y. COURT OF APPEALS.

Robinson, *respt.*, v. Frank, *applt.*

Decided Nov. 29, 1887.

Where a contract provides for the doing of certain work on notice or demand, a refusal to perform excuses the other party from making any demand or serving any notice.

This was an action upon a contract between F. & G. for the manufacture of certain machines and brought by plaintiff as assignee. It provided that in case the machines or a part of them were not manufactured and delivered by F. as provided for within thirty days after notice in writing from G., that G. without further notice could at his option collect of F. four dollars for every machine F. had failed "to manufacture and deliver in conformity to the provisions of this contract, and any sum so becoming payable shall be paid thirty days after notice in writing is given to said

F. and said G. of the non-delivery of the machines for which the money shall become payable. The complaint alleged that the defendant had manufactured and delivered under the contract only 100 machines; that on Feb. 1, 1881, there was due on account of said contract four dollars apiece on 1,400 machines undelivered, viz., \$5,600; that on March 1, 1881, plaintiff, as assignee of G., by an instrument in writing signed by him and dated on that day, duly notified defendant that the time for the making of said machines had fully expired, and demanded of the defendant said sum of \$5,600. It was admitted that plaintiff never directed the defendant to manufacture or ship any of said machines, or gave any order for the delivery of any of the machines mentioned in the complaint, and that no such directions or orders were given by G. prior to the assignment to plaintiff except for 100 machines manufactured. The court found that defendant ceased and refused to manufacture the machines under the contract and so notified plaintiff.

Rogers, Locke & Milburn, for *applt.*

Spencer Clinton, for *respt.*

Held, That defendant's refusal afforded ample excuse and justification to plaintiff for his omission to make any further demands, or to serve any other notices than the one he served. 69 N. Y., 286.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Per curiam opinion. All concur.

RECORD. PRIORITY.

N. Y. COURT OF APPEALS.

Seymour, *respt.*, v. McKinstry et al., *appls.*

Decided Oct. 11, 1887.

One who claims rights as a subsequent purchaser under the recording act must plead and prove not only that he was a purchaser of record, but that he was a purchaser in good faith and for a valuable consideration.

See S. C., 26 W. Dig., 573.

This was a motion for a reargument of an appeal in the above entitled action, decided by this court June 7, 1887. The action was brought by plaintiff as vendor of real estate against the defendants, one as mortgagee and the other as assignee of the mortgage given by the vendee of the land. The controversy is in relation to the priority of their claims. A decision was rendered in favor of the vendor's lien, which was affirmed by the General Term and by this court. Both of the defendants appealed. The defendant who was assignee of the mortgage moves for a reargument, claiming that he was an innocent purchaser of the mortgage. His answer did not deny notice of plaintiff's rights, and there was no proof that he had not received notice. The complaint did not allege waiver of notice by plaintiff, or that the assignee defendant took with notice.

Louis Marshall, for motion.

M. M. Waters, opposed.

Held, That the duty of setting up that he had no notice and of proving it was upon the as-

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signee, and as he did not so plead and had not proved that fact the judgment of the court below was properly sustained. The character of "purchaser" under the statute (1 R. S., 756, § 1) is an independent one, and defendant to avail himself of it was obliged to plead and prove not only that he was a purchaser of record, but that he was a purchaser in good faith and for a valuable consideration.

A defendant who would avail himself of new matter as a defense must aver and prove it. 3 Paige, 436; 7 Johns. Ch., 65; 6 Wend., 213; 7 Cow., 360; 49 N. Y., 286.

Motion denied.

Opinion by *Danforth, J.* All concur.

MANDAMUS. POLICE JUSTICE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People ex rel. Newton A. Calkins v. The Board of Supervisors of Greene Co.

Decided Sept., 1887.

Officers are required by Chap. 341, Laws of 1864, to make a report to the supervisors of moneys received by them in which the county is interested and this report is a condition of any payment by the supervisors for services.

The supervisors had knowledge that a police justice had received such moneys and that they were not included in his report presented. *Held*, That whether the police justice had made a proper disposition of these moneys or not, inasmuch as he had withheld them from his report, the supervisors were entitled to refuse payment of his account and that he was not entitled to a peremptory mandamus.

Relator's account as police jus-

tice was rejected by defendants because he had made to them a report required by Chap. 341, Laws of 1864, which was incomplete, to their knowledge. Relator reported that he had received no money in which the town or county had an interest. He had in fact received \$50 from a person accused of grand larceny. He discharged the accused, it seems, upon the ground that a fraud and not a felony had been committed. Relator applied some of this money for services alleged to have been rendered by him to the accused in a capacity other than that of a magistrate. He credited to the county \$20 upon his fees and the balance was spent for charges against the accused which the relator assumed. This is an appeal from a judgment and order awarding relator a peremptory mandamus.

J. B. Olney, for applt.

N. A. Calkins, for relator.

Held, That as relator had not made his report as required by statute he was not entitled to a mandamus. If the accused had not committed a felony relator might perhaps have exacted this fifty dollars of the accused to reimburse the county for expenses of prosecution. Still the practice is not to be commended. But this money was then presumptively money of the county and defendants knowing he had received it and not finding it in relator's report might properly refuse to pay his bill. But relator from this sum paid a part to himself for his own services rendered, as alleged, not as a magistrate. We gravely

doubt whether he could do this. Had he made an itemized account of services some of the items might have been rejected by defendants. The referee has found that relator made a proper application of the \$50. We do not now pass upon this question. The board of supervisors was the auditing body and relator cannot audit and pay his own accounts. He shows no clear right to a mandamus.

Order reversed and writ refused.

Opinion by *Landon, J.*; *Learned, P. J.*, and *Williams, J.*, concur.

LIMITATION.

N. Y. COURT OF APPEALS.

Price, respt., v. *Mulford*, *applt*

Decided Nov. 29, 1887.

When one receives money in his own right and is afterward by evidence or construction changed into a trustee he may insist on the same lapse of time as a bar.

In an action for money had and received, fraud not being the ground of action, the statute of limitations is a perfect defense, although the fund was received under circumstances implying a trust.

Reversing S. C., 32 W. Dig., 74.

One P. while an infant became entitled to \$1,909.13, being his share of the proceeds of land sold in partition proceedings about 1845. At his death in 1859 the fund was in the hands of the treasurer of Richmond County, and in June, 1883, the then treasurer of said county by direction of the court delivered the same to the widow and heirs of P. Among other securities was a paper in these words:

ROSSVILLE, July 12, 1864.

This is to certify that St. Patrick Roman Catholic Church, Richmond, Staten Island, is indebted to Mr. D. Keeley \$1,350 for work performed on the same.

\$1,350. JOHN BARRY, *Pastor*.

INDORSED.

Please pay the within to Messrs. Mulford & Wandell or order.

DENIS KEELEY.

Other indorsements by the indorsees showed that they received payments of interest thereon up to July 12, 1867, then followed an indorsement made July 1, 1868, viz.:

"Please pay the within amounts of \$135.50 and interest to E. P. Barton, county treasurer (App'd Jan. 1, 1868). Mulford & Wandell per P. S. Wandell."

In Sept., 1883, plaintiff who was one of the heirs of P. became by assignment from the widow and the other heir sole owner of the certificate. Wandell was county treasurer from 1865 until sometime in 1868, and was a member of the firm of Mulford & Wandell from June, 1862, to June, 1869. He was succeeded in office by Mr. Barton. The indorsement to the latter was made by Wandell and in the official book containing the account of court funds this security was entered. It also appeared that at the same time the firm of Mulford & Wandell was indebted to Wandell and the certificate was charged to Wandell on the firm books on account of that debt. There was no evidence of any personal participation on the part of Mulford in any of these transac-

tions except as it might be imputed to him from his connection with Wandell as a partner. Plaintiff claimed to recover on the ground that the money went to the benefit of the firm and judgment for the amount was prayed for as for so much money "had and received to and for the use of the plaintiff." At the close of plaintiff's case defendant Mulford asked for a dismissal of the complaint upon several grounds, among others, that the cause of action did not accrue at any time within six years next before the commencement of the action. Plaintiff then moved to amend the complaint by adding in the prayer for judgment after the date 1868 (that being the time that the cause of action was alleged to have accrued) "that the defendant be held to have received said sum of money as trustee for the benefit of the plaintiff."

The motion to dismiss was denied and that to amend granted. The judge directed the jury to inquire whether Wandell had applied the money to the benefit of the firm, saying it did not make any difference whether Mulford knew anything about it, he having the benefit of the funds was liable.

Samuel L. Mulford, for applt.

Henry D. Hotchkiss, for resp't.

Held, That the action being an action for money had and received, and fraud not being the ground of the action, the statute of limitation was a perfect defense. 87 N. Y., 160. It was not less a defense although the fund had been re-

ceived under circumstances from which the law would imply a trust. The case of an express or direct trust would be different.

When one receives money in his own right and is afterward by evidence or construction changed into a trustee, he may insist upon the same lapse of time as a bar. 7 Johns. Ch., 89; 103 N. Y., 672.

Also held, That the action not being to procure a judgment other than for a sum of money, subd. 5, of § 382, Code Civ. Pro., is not applicable.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed.

Opinion by *Danforth, J.* All concur.

EXECUTORS. LIMITATION.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John W. Cramer, *applt.*, v. Ossian Bedell, *admr.*, *respt.*

Decided Oct., 1887.

Where a claim against decedent's estate is presented to an administrator before the completion of the publication of the notice for presentation of claims, and the same is rejected, an action thereon must be commenced within six months after such rejection, unless the same is referred as prescribed by the Code.

Appeal from judgment entered upon the report of referee dismissing complaint.

Action to recover a claim against the estate of a deceased person. The referee found as facts, that after the commencement, but before the completion

of the publication of the notice to creditors to present their claims, and on or about the 28th of Feb., 1882, plaintiff presented to defendant, as administrator, a claim or account against the decedent, the whole of which was claimed to be due at that time, containing the same items appearing in the bill of particulars in this action, and upon which the action was brought. That such account or claim was disputed or rejected by defendant in the month of May, 1882, and that this action was commenced on the second day of Feb., 1884. As a conclusion of law, that plaintiff's claim is barred by reason of the statute.

Defendant testified that he retained Mr. Robbins as his attorney and gave him all the authority that was necessary to enable him to defend; and that he gave Robbins the account soon after plaintiff presented it to him.

Robbins testified that he was employed by defendant soon after he was appointed administrator; that the account was given to him, and shortly after the 1st day of May, 1882, he told plaintiff that he had consulted with Bedell, the defendant, that they disputed and rejected the account, and that he must bring a suit upon it so as to determine it because defendant was anxious to settle the estate.

Martin Clark, for *applt.*

E. C. Robbins, for *respt.*

Held, That the conclusion of the referee that plaintiff's action was barred by the statute of limitations was correct, Code Civil Procedure, § 1822, and that the

evidence, though conflicting, was sufficient to sustain the findings of the referee.

Judgment affirmed.

Opinion by *Haight, J.; Smith, P. J., Barker and Bradley, JJ.*, concur.

AGRICULTURAL SOCIETY. ELECTIONS.

N. Y. SUPREME COURT. GENERAL
TERM. THIRD DEPT.

In re petition of William M. White et al.

Decided Sept., 1887.

Chapter 181, Laws of 1871, empowers life members of the State Agricultural Society to vote by proxy at all elections of officers. At the annual meeting in 1887 the society passed a resolution "that no proxy should be voted on at any meeting unless showing within itself that it was specifically intended to be used at such meeting." *Held* That the resolution was repugnant to the statute and void. Although a proxy was in blank and was filled out immediately before the election it is, in the absence of any challenge by the maker of the power of attorney, good and must be counted.

By § 3, Chap. 131, Laws of 1871, life members of the New York State Agricultural Society are entitled to vote by proxy at all elections of officers. At an annual meeting of the Society, held Jan., 1887, a resolution was passed "that no proxy shall be voted on at any meeting of this society unless showing within itself that it was specifically intended to be used at such meeting." Under this resolution proxies were rejected. Many of those rejected were in blank and were admitted to have been filled out by the

holder at or about the day of the election. If counted these would have changed the result. This was a motion to set the election aside and for a new election. Below the motion was denied.

De Witt & Spoor, for appls.

N. C. Moak, for respts.

Held, That the resolution was repugnant to the statute and was void. Under this statute any member could appoint his proxy and give him unlimited power to vote at all elections. If a proxy was filled out just before the election the maker of the power of attorney might challenge its completeness. 24 N. Y., 330; 58 id., 397; 6 Allen, 305. But there is no such challenge from the maker and the presumption, therefore, is that the name of the proxy was written in the blank by authority of the maker. 36 How. Pr., 477; 22 Wend., 348.

Order reversed and new election ordered.

Opinion by *Landon, J.; Learned, P. J.*, and *Williams, J.*, concur.

HABITUAL DRUNKARDS.

N. Y. SUPREME COURT. GENERAL
TERM. FIRST DEPT.

In re application of Helen M. Hoyt.

Decided Oct. 26, 1887.

An affidavit relating only to the condition of a person on a single occasion is not sufficient to show that such person is an habitual drunkard.

Appeal from order denying motion to vacate order for a commission *de lunatico*.

This proceeding was brought under Chap. 17, Tit. 6, Code Civ. Pro., to procure an adjudication that Mary Irene Hoyt, who was the daughter of the applicant, was an habitual drunkard. The only affidavits presented to show that it was a case within the statute were those of a physician who had attended her and of a justice of the peace that she had been charged with assault and battery by a servant, appeared to be crazed from effects of liquor, and was held to bail.

F. J. Dupignac, for applt.

J. M. Van Cott, for resp't.

PER CURIAM. Disregarding the affidavit of Dr. Milne, which we must do under the provisions of § 834 of the Code, the only proof by affidavit that the case presented is one specified in title 6 of the Code of Civ. Pro. is that of George R. Dutton, a justice of the peace in Englewood, New Jersey. This affidavit relates only to one occasion and affords no proof of the fact alleged that the person proceeded against is an habitual drunkard.

Order reversed, without costs, and order entered dismissing proceedings with leave to renew on additional papers.

LEASE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Frederick F. Ayer et al., admrs., et al., *respts.*, v. Robert P. Getty, *applt.*

Decided Oct. 26, 1887.

Declarations or admissions made by a les-

see after the termination of the lease in an action for the rent are not competent evidence against his surety on the lease.

Appeal from judgment in favor of plaintiffs, entered on report of referee.

Action against defendant as surety on a lease. July 17, 1874, J. C. Ayer and Frederick Ayer leased to S. E. Getty certain premises for the term of two years and nine months to be used for storage purposes as public stores, for a rental proportionate to the gross receipts received by the lessee. Defendant was surety on the lease. After the termination of the lease a judgment was recovered against S. E. Getty for a balance of rent due, which not being paid this action was brought by the administrators of J. C. Ayer and Frederick Ayer to recover the same from defendant. On the trial of this action S. E. Getty having failed to produce his books in pursuance to notice and having stated that he did not know where they were, the stenographer on the former trial was allowed to testify to admissions made by said S. E. Getty on said trial on Nov., 1877, as to the correctness of certain copies taken from his books of account; as to corrections to be made thereto; as to receipts from sweepings of cotton, and as to payments of rent.

Merritt E. Sawyer, for applt.

James E. Chandler, for respts.

Held, Error. In no sense do these admissions appear to have been a part of the *res gestæ* so as to take them out of the rule laid down in *Hatch v. Elkins*, 65 N.

Y., 489, where it is expressly held that while the declarations of the principal made during the transaction of the business for which the surety is bound so as to become part of the *res gestæ* are competent evidence against the surety, his declarations made subsequently are not competent. It is sought to sustain the reception of the declarations of the principal in the present case on the ground that they related to the contents of the lost books rather than to any acts of his own, but some of his admissions appear to have been independent of the contents of the books, or supplementary thereto, so as to constitute distinct testimony as to facts which the books of themselves might not disclose. The statement as to sweepings seems to be of that character.

Respondent claims that the facts of this case render the doctrine of *Hatch v. Elkins* inapplicable and bring it under the rule laid down in *Howe Machine Co. v. Farrington*, 16 Hun, 591. The latter case, however, is an authority equally hostile to his position. The declarations there held to be admissible were made by the principal while carrying on the very business to which the contract of suretyship related, and consisted of admissions as to the correctness of certain books relating to that business when they were exhibited to him. The declarations were therefore said to be a part of the *res gestæ* and so properly received in evidence. But, says the General Term, "it would have been otherwise if they

had been made after the transactions were closed for which the surety was bound."

Judgment reversed and new trial granted, costs to abide event.

Opinion by *Bartlett, J.*; *Van Brunt, P.J.*, and *Brady, J.*, concur.

APPEAL.

N. Y. COURT OF APPEALS.

The Ithaca Agricultural Works, *applt.*, v. Eggleston, *respt.*

Decided Nov. 29, 1887.

Where, on motion in County Court for leave to issue execution on a judgment recovered in Justice's Court and transcript filed, a claim was made that plaintiff was not the owner of the judgment but had assigned it, and the alleged assignee was allowed to present proofs of said assignment, *Held*, That it was substantially a special proceeding and that an appeal would lie from the order of the County Court under § 1857.

On Jan. 17, 1878, plaintiff obtained a judgment against defendant by confession before a justice of the peace in Chenango County for \$310.69. A transcript thereof was filed in county clerk's office the next day. In Sept., 1883, plaintiff's attorney noticed a motion for leave to issue execution, and in the affidavit upon which the motion was to be made, stated the above facts and also that plaintiff was then the owner of such judgment and that it was then wholly unpaid; that five years had elapsed since the judgment was docketed and the transcript filed and no execution had been issued on it. The motion was noticed for a term of the County

Court and the papers were duly served upon the defendant. Upon the hearing, defendant did not appear, but one A. B. E. appeared by counsel and made an affidavit that he owned the judgment by assignment by plaintiff through its general agent. The motion was ordered to stand over, and permission was given to plaintiff and A. B. E. to furnish further evidence concerning the alleged assignment. Pursuant to such order plaintiff and A. B. E. appeared before the court on the adjourned day and each read further affidavits. The defendant still failed to appear. A reference to take proof upon the several issues was ordered, among them those of ownership and of fraudulent representations made by the contestant to the plaintiff's general agent to induce the assignment. The referee found that plaintiff made an agreement in writing to sell the judgment to the contestant upon certain terms and that there was no fraud. It did not appear that this agreement was ever carried out, but it would seem never to have been. On a motion to confirm the report of the referee the plaintiff and A. B. E. only appearing, it was confirmed with \$10 costs and disbursements to be taxed against plaintiff. Plaintiff appealed to the General Term of the Supreme Court, where after argument the appeal was dismissed, as not appealable.

Plaintiff appealed to this court.

E. Countryman, for applt.

Fancher & Sewall, for respt.

Held, That an appeal would lie

upon the order of the County Court to the Supreme Court under § 1357 of the Code; this was substantially a special proceeding within the meaning of that section.

Kincaid v. Richardson, 25 Hun, 237; *Andrew v. Long*, 79 N. Y., 573, distinguished.

As to whether an ordinary application to the court in which a judgment was obtained for leave to issue execution is a special proceeding instead of a summary application in an action after judgment, *quære*.

As to whether an appeal lies to the Supreme Court from an order made by the County Court in an action in which a transcript was filed in a Justice's Court, *quære*.

Order of General Term, dismissing appeal, reversed with costs, and the appeal ordered to be heard upon its merits by the General Term.

Opinion by *Peckham, J.* All concur.

EXCISE. INJUNCTION.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Charles Standard et al., respts., v. Carnes S. Burtiss et al. impl'd., applts.

Decided Oct., 1887.

An action may be maintained by a taxpayer, under Chap. 581, Laws of 1881, against the commissioners of excise of a city, in a proper case and with the requisite averments in the complaint, to enjoin them from compromising, settling or discharging a judgment obtained by them for penalties imposed by the excise law, which judgment had been affirmed

and an appeal was pending in the Court of Appeals, except upon full payment thereof; and also to restrain them from removing their attorney of record and appointing another in his stead, in order to carry out their plan or scheme to defraud the city.

Complaint in such an action held sufficient. In such an action, where the judgment debtors are alleged to be planning and attempting to settle and discharge the judgment without paying it, etc., they may be made parties to the action and be enjoined from doing anything which may tend to accomplish the illegal acts alleged.

Appeal from interlocutory judgment overruling demurrer to complaint.

Action brought under Chap. 531, Laws of 1881. The complaint substantially alleged that a former board of excise of Auburn recovered a judgment for \$1,800 against appellants B. for selling liquor without a license, which judgment was affirmed at General Term and an appeal therefrom was pending in the Court of Appeals; that the amount of said judgment, when collected, is to be paid to the treasurer of Auburn for the support of the poor of the city; that defendant commissioners of excise are taking steps to change their attorney so as to carry out their plan of discharging or preventing the collection of said judgment and the final success of the action; that appellants B. are engaged with said commissioners in such plans and attempt of settlement; that said commissioners are planning with appellants to compromise the judgment for a nominal sum, with the avowed purpose of settling a

doubtful litigation, when in point of fact their sole and only purpose is to favor and benefit said appellants and to enable them to accomplish their scheme. That said commissioners are seeking to remove their attorney and to substitute another in his stead, as their attorney does not favor their plans; that their conduct is illegal and improper, and if they succeed in consummating their plans irreparable injury will be done to the city and its taxpayers. That appellants are pecuniarily responsible and the judgment collectible. Prayer for injunction to restrain defendants from doing any of the acts complained of, and from settling or discontinuing the action or discharging the judgment, except upon full payment thereof; that defendant commissioners be enjoined from changing their attorney; that in case a settlement has been consummated and the judgment satisfied, that the same be vacated; and that said commissioners be required to indemnify the city out of their own property by reason of any loss arising by their acts aforesaid, etc.

J. D. Teller, for appls.

F. S. White, for respts.

Held, That the complaint set forth a good cause of action under the statute.

It appears that the commissioners of excise were about to cancel the judgment mentioned in the complaint upon payment of a sum much less than its face, for the purpose of favoring such debtors at the expense of the taxpayers of the city, whom they officially rep-

resented, and because they were opposed to the enforcement of the excise law. Said judgment was sustained by the court of last resort. 103 N. Y., 136. The statute seems to govern this case, and authorizes an action to restrain the commissioners from wasting the property of the city. Chapter 531, Laws of 1881.

Courts will not restrain officials from exercising discretionary powers in good faith; when, however, they threaten an abuse of that discretion they may be enjoined. 19 Barb., 166.

The complaint charges that defendant commissioners are about to do an act in gross violation of law and of their duties as such officers, in order to shield appellants from the just consequences of their violation of laws. In such case it is proper to enjoin. 90 N. Y., 410.

Only defendants Burtiss appeal, and it is claimed that the action will not lie against them as they are not acting or attempting to act officially, nor in behalf of the city. The complaint alleges that they are acting with the commissioners in their illegal proceedings, and they are planning and attempting to settle and discharge the judgment without its payment. If the court has the power to enjoin the commissioners from consummating the illegal acts alleged, it may enjoin appellants from doing anything which may tend to accomplish the improper acts. They are directly interested in the proposed action of their co-defendants and are entitled to be heard

on the trial before a decree is made. Hence it is proper to unite them as defendants. Code, § 447; Barb. on Parties, 326, 482; 19 Wall., 563-4.

There is but one cause of action stated in the complaint. The relief sought is a perpetual injunction restraining defendants from settling or discharging the judgment before it is paid in full, and from substituting attorneys. One of the contemplated acts of the commissioners alleged is an attempt to substitute another attorney in order to consummate their designs. These allegations do not constitute two causes of action. The relief demanded seems to be contemplated by the act of 1881; still if relief prayed for is not warranted by the alleged facts, a demurrer for that reason will not lie. 13 Abb., 195; Moak's Pleadings, 279, 756.

Judgment and order affirmed.

Opinion by *Lewis, J.; Smith, P.J., Barker and Bradley, JJ.*, concur.

HIGHWAYS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Isaac Hampton, *respt.*, v. Martin S. Hamsher, *applt.*

Decided Oct., 1887.

Plaintiff was a resident of the town of O. and lived upon a farm a portion of which was situated in the adjoining town of N., but was assessed in respect to the whole farm in the place of his residence. In 1885, the commissioners of highways of O. in apportioning the amount of highway labor chargeable against him, followed the last assessment roll of the

town, and included that portion of his farm lying in the town of N. *Held*, That as the whole farm was borne upon the last assessment roll of the town of O.. it was the duty of the commissioners in making their apportionment of highway labor to follow that roll and to assess plaintiff according thereto.

Appeal from judgment of County Court reversing justice's judgment.

Action to recover pay for three day's services performed upon the highway. Plaintiff was a resident of the town of Ossian, living upon a farm lying partly in that town and partly in the town of Nunda. The whole of the farm was assessed for town, county and State purposes in Ossian. In 1885, defendant, as commissioner of highways, in apportioning the amount of highway work chargeable against plaintiff in the road district in which he lived in Ossian, included that portion of his farm in Nunda, following the last assessment roll of Ossian. It was contended by plaintiff that defendant exceeded his jurisdiction.

Chas. J. Bissell, for applt.

J. M. McNair and *R. T. Wood*, for respt.

Held, That as plaintiff was an inhabitant of the town of Ossian and the whole farm appeared upon the last assessment roll of that town, he was properly assessed therefor on account of highway labor in Ossian, notwithstanding a portion of the farm was lying in the town of Nunda.

The Revised Statutes provided that when the line between two towns divides a farm, the same should be taxed, if occupied, in

the town where the occupant resides; if unoccupied, each part shall be assessed in the town in which the same shall lie. 1 R. S., 389, § 4. This provision is general, and not necessarily limited to town, county or State taxes, but covered highway taxes as well. This section was amended by Chap. 287, Laws of 1871, which was repealed by Chap. 355, Laws of 1872, the effect of which was to repeal the entire provision. 33 Hun, 279; 37 id., 214; 67 N. Y., 109. But the original section was restored by Laws of 1886, Chap. 315. It thus appears that when this assessment was made the provision of the Revised Statutes was not in force; still plaintiff acquiesced in the assessment of his whole farm in Ossian.

Sections 19 and 24 of the Rev. Stat., (1 R. S., 505, 506) prescribes the duties of highway commissioners in assessing highway labor. Under Subd. 3 of § 24, the work is to be apportioned upon the *estate*, real and personal, of every inhabitant of the town, as the same shall appear by the last assessment roll of the town. Defendant did follow the last assessment roll in apportioning plaintiff's highway labor, and as that part of plaintiff's farm lying in Nunda was borne upon the assessment roll of Ossian, he was properly assessed for that land in the town of Ossian for highway labor. Section 19 does not in terms limit the assessment to lands in the town, but only to the *persons* owning land therein. Section 22 has reference to non-resident lands,

and does not authorize an assessment of plaintiff's land in Nunda, as it was not non-resident land, but a portion of the farm upon which he lived. Besides this section gives no power to the commissioners of highways to assess the value of the lot, for the value must be the same as was fixed by the last assessment roll of the town. Commissioners of highways in Nunda could not value the lot, neither could they get its value from the last assessment roll, for it was not borne upon the assessment roll of that town.

Section 1, Chap. 107, Laws of 1832, and § 1, Chap. 154, Laws of 1835, were enacted when 1 Rev. Stat., 389, § 4, was in force, and must be considered in connection with it, and when so considered it is apparent that there is no conflict, and that the lands mentioned in these sections mean other lands in the town owned by an individual which he occupies for the purpose of cultivation, either in person or by his servant or agent, but upon which he does not live.

The provisions of Chap. 770, Laws of 1866, to the effect that highway tax upon land shall be worked out in the district in which the land is situated, should also be read in connection with said § 4. We do not think that this chapter repeals or modifies that section.

Plaintiff's lands were not omitted lands within the provisions of § 6 of Chap. 431, Laws of 1837, for they were in fact borne upon the assessment roll. All of these provisions were enacted whilst said § 4 was in force, which

we have referred to for the purpose of determining the proper construction of these several provisions. These various enactments are a part of the system devised by the legislature for the purpose of assessing property and maintaining the expenses of the State, county and local government, of which the management of highways forms a part. The system was intended to be harmonious and uniform, and we cannot believe that it was intended that farms intersected by town lines were to be assessed in one town for one purpose and in another town for another purpose.

56 Barb., 380; 31 id., 138, are distinguishable, yet they are authority for holding that the commissioners of highways in apportioning the highway labor must follow the last assessment roll in determining the amount of labor to be assessed to each resident of their town.

Judgment of County Court reversed.

Opinion by *Haight, J.*; *Corlett, J.*, concurs. *Bradley, J.*, not voting.

JURORS.

N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Henry Rankin, *respt.*, v. Augustus Nelson, *applt.*

Decided July, 1887.

To sustain a motion for a new trial on the ground of misconduct on the part of a jury the applicant must show some irregularity or misconduct by which he was prejudiced.

The mere fact that a person has been subpoenaed as a witness does not disqualify him as a juror, and there is no reason for the disclosure of that fact on his examination as to his state of mind on the merits.

Appeal from order granting a new trial.

The action was tried and resulted in a verdict for defendant. Plaintiff moved for a new trial on the ground of misconduct of one of the trial jurors, which motion was granted. The juror was subpoenaed as a witness by defendant's attorney to prove the value of hay and grain and the expense of keeping cows, was paid his fees, but does not appear to have been called or sworn; it did not appear that he had any interest in the case or knowledge of the facts, or that he as a juror took any active part in favor of either party, the jury being unanimous from the time they retired. Two other jurors were challenged and did not sit and were afterward called as witnesses, and it is claimed that a peremptory challenge was lost by the misconduct of one of them.

Clarence H. Frost, for applt.

E. C. Niel, for respt.

Held, That no sufficient cause was shown for setting aside the verdict. To sustain a motion for a new trial on the ground of misconduct on the part of a jury the applicant must show some irregularity or misconduct by which he is prejudiced. It does not appear that he would have challenged either A. or S. if his challenge had remained to him, and the fact that they had been subpoenaed

as witnesses did not disqualify them to sit as jurors. It does not follow that because a person is subpoenaed as a witness he is prejudiced in favor of the party requiring his services.

Per *DYKMAN, J.*—Jurors have always been competent witnesses for either party in the common law courts, and there was no reason for the disclosure of the fact of his subpoena by the juror when he was interrogated respecting the state of his mind in relation to the merits of the case.

Order reversed, with \$10 costs.

Opinions by *Pratt* and *Dykman, JJ.*; *Barnard, P.J.*, concurs.

FORECLOSURE. SURPLUS. ASSESSMENTS.

N. Y. COURT OF APPEALS.

Day, respt., v. *The Town of New Lots, applt.*

Decided Oct. 11, 1887.

Plaintiff paid his bid on foreclosure and the surplus was deposited with the clerk. Defendant obtained a portion of it for an assessment on the property which was subsequently adjudged void. Plaintiff sued to recover said money, claiming to be the owner thereof. His only proof on that subject was that he had paid a subsequent valid assessment. *Held*, That the action could not be maintained; that the surplus belonged to the mortgagor, and that plaintiff's right to be reimbursed for the payment of the valid assessment not being presented or determined, and the real party in interest not being represented, it was unnecessary to raise the objection by answer.

The General Term cannot base a reversal on facts neither proved before nor found by the trial court and of which it could have no legal information.

This action was brought by plaintiff, a purchaser at a foreclosure sale, who alleged in his complaint that he paid the amount of his bid to the referee by whom the sale was made; that said referee made the payments directed by the decree of foreclosure to be made and a surplus was deposited by him by order of the court with the county clerk; that on Feb. 1, 1874, defendant's collector received \$2,197.82 of said moneys from said clerk, which sum he applied on a warrant held by him for the collection of an assessment for grading Atlantic avenue, which was subsequently adjudged to be illegal and void; that said sum was received by and applied to the uses of the defendant; that \$1,499.93 of said sum "belonged to and was and still is property of plaintiff, and was so taken and received without the knowledge or consent of the plaintiff and without any notice to him." The admissions of the answer left the question as to the ownership of the surplus moneys the only material issue of fact presented by the pleadings. The only evidence given by plaintiff as to the ownership of the surplus moneys was that he had paid a subsequent valid assessment for the same property. No motion was made by plaintiff to amend his complaint, or to conform the pleadings to the proof, and there was no claim or suggestion of a right to recover upon any cause of action except that presented by the complaint. The trial court held that plaintiff's proof failed to make out a cause of action; that

he had shown no title in or to the surplus moneys and dismissed the complaint.

D. D. Whitney, for applt.

Mathew Hale, for respt.

Held, No error; that the surplus moneys belonged to the mortgagor, or the owner of the equity of redemption, 83 N. Y., 100; that plaintiff's equitable right to be reimbursed for the payment of the valid assessment by him not having been presented by the pleadings, or determined by the trial court, and the real party in interest not having been represented in the litigation, it was unnecessary to raise the objection by answer as required by the Code, §§ 488, 498, 499, as a party can only be required to plead as to the causes of action stated in the complaint.

Judgments must be rendered in accordance with the allegations and proofs of the parties. 25 N. Y., 266.

It was competent for the court rendering the judgment in the foreclosure action to direct the land to be sold free of all liens, taxes and assessments thereon, or subject thereto, or it may require them to be paid out of the proceeds of the sale, under such terms and conditions as it may prescribe. The General Term of the Supreme Court may not base a reversal of a judgment rendered by the trial court upon facts neither proved before nor found by it, and of which it could have no legal information.

While an appellate tribunal may under certain circumstances permit a record not introduced in

evidence in a court below to be produced upon the argument before it, this is allowed only for the purpose of sustaining a judgment and never for the purpose of reversing one. 62 N. Y., 639; 69 id., 254.

Appellate tribunals are required in reviewing judgments rendered upon a trial before a court or referee to indulge all reasonable presumptions in support of them, and to assume that they considered all the evidence in a case and came to a conclusion adverse to the appealing party thereon, when it is necessary to support the judgment rendered. 70 N. Y., 116; 42 id., 484.

The money was received by defendant in Feb., 1874. This action was brought in Jan., 1884.

Held That it was barred by the statute of limitation.

Order of General Term, reversing judgment dismissing complaint, reversed, and judgment affirmed.

Opinion by *Ruger, Ch. J.* All concur.

SHIPPING. NUISANCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

William H. Van Norden et al.,
appls., v. Clinton Robinson, *respt.*

Decided Sept., 1887.

Defendant's steamboat was lying at a dock when its boiler exploded and injured plaintiff's steamboat which was at the same dock. It appeared that the boiler which exploded was in good condition. No negligence was shown upon the part of defendant or his servants and no cause for the explosion could be discovered.

But it further appeared that the boat had no government license and the captain and engineer had none. *Held*, That irrespective of the question of negligence, the running of the boat in defiance of these statutes was to maintain a nuisance and that plaintiff could recover.

Appeal from judgment for defendant entered upon report of a referee.

Action for damages done plaintiff's steamboat by the explosion of the boiler of defendant's steamboat. Plaintiff's steamboat had a license and its officers were licensed when the explosion took place. Defendants' steamboat had no license upon that day nor had its engineer nor captain. Both boats ran on the Hudson river. They were at a dock about fifty feet apart and had been lying there some hours. Up to 1 A. M. defendant's engineer was in charge. There was then a fire under the boiler and about fifty pounds of steam. After the engineer left the fireman took charge. The explosion took place about 2:40 A. M. The actual cause of the explosion is not known. The referee found that the boiler was in good condition and the engineer capable. The referee reported: "I do not find that this explosion was caused by the negligence or want of ordinary care or prudence on the part of the defendant or any of his employees, * * * but the same was occasioned by some mysterious cause not so explained by proof that I can find the immediate cause." The referee found that employment of the boat without a license was in violation of §§ 4417, 4418, 4427 and 4499, U. S. R.

S.; that the engineer's employment was in violation of § 4438. He also found that one of two safety valves was unlawfully loaded.

J. C. Ormsby, for applts.

E. L. Fursman, for respt.

Held, That the decision of the referee was erroneous. Where one does an act, which is in its consequences injurious, he is liable irrespective of negligence. 81 N. Y., 52; 51 id., 224; 18 id., 79; 29 id., 591; 23 Wend., 446. Storage of gunpowder in a densely populated place, however carefully it may be kept, is a nuisance. 80 N. Y., 579. The Penal Code, § 385, declares a public nuisance to consist, among other things, "in unlawfully doing an act or omitting to perform a duty which act or omission in any way renders a considerable number of persons insecure in life or the use of property." Poison must be labeled. 6 N. Y., 409; 92 id., 490. One keeping a vicious dog, knowing it to be such, is liable. 73 N. Y., 196. Similar principles are established by the cases. 140 Mass., 106; 104 id., 64. To navigate the Hudson river with an uninspected boiler was to maintain a nuisance.

The referee has held substantially that navigation by this boiler was not a nuisance because the boiler was good and in good condition. Where is the evidence of this? The boiler was blown into fragments with terrific force. An inspection might have shown the boiler deficient. Such a statute must be obeyed. 19 Wall., 137; 23 N. Y., 42; 34 Moak's Eng. Reps.,

199. No one knows and no one now can know what such an inspection would have disclosed. And at any rate the burden is on defendant to show that his failure to comply with the law did not contribute to the result.

Defendant cites cases to show that the doing of an act in violation of an ordinance whereby a third party without fault upon his part is injured is evidence of negligence, but not necessarily negligence. But in the case of a statute it seems to be negligence. 45 N. Y., 660; 36 id., 132; 64 id., 535; 111 U. S., 228. If it can be seen that non-compliance with a statute or ordinance has nothing to do with the accident, it is immaterial. But how can that be said here? If the boiler had not been used there could have been no explosion, and we know that it was unlawful to use the boiler as it was. The case seems to come within the principle of 106 Mass., 458.

Judgment reversed.

Opinion by *Landon, J.*; *Bockes J.*, concurs for reversal, and cites 25 Md., 531; 19 Wall., 136; *Learned, P.J.*, concurs.

MECHANICS' LIENS.

N. Y. COMMON PLEAS. GENERAL TERM.

Patrick Larkin et al., *applts.*,
v. Michael McMullen et al., *respts.*

Decided Dec. 5, 1887.

Under Laws of 1885, Chap. 842, § 1, subcontractors may have a lien for materials used in the work furnished the contractor to the extent of the difference between the amount actually paid such contractor and otherwise expended to

complete the work, and the contract price, though at the times the liens were filed the contractor had abandoned the contract and the owner had himself undertaken to complete.

Appeal from judgment in favor of defendants.

Action to foreclose mechanics' liens. The owner's defense was a claim that when the liens were filed he had paid his immediate contractor in full, and that under Laws of 1885, Chap. 342, § 1, the plaintiffs, who were sub-contractors, who had furnished materials to defendant McMullen, the principal contractor, had no right of action. McMullen, who immediately contracted with the owner, did not complete his contract, but abandoned it, and the owner finished the work. McMullen earned and was paid by the owner \$550, the contract price being \$900. It appeared that the amount paid McMullen and the amount expended by the owner in completing the work, excluding plaintiffs' claim, added together, was less than \$900, the contract price.

M. A. Potter, for appls.

Lewis Hurst, for respts.

Held, That to the extent of the difference between the contract price and the amount actually expended by the owner to complete the contract work the plaintiffs' liens should attach. It was not the intention of the legislature to limit the owner's liability to such amount of the contract price as happened to be payable under the express terms of the agreement at the time of the filing of the lien. 43 Hun, 413; 81 N. Y., 217.

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Hagan v. Am. Baptist Soc., distinguished.

Judgment reversed, with costs to abide event.

Opinion by *Larremore, Ch. J.*; *Daly* and *Van Hoesen, JJ.*, concur.

PARTNERSHIP. STATUTE OF FRAUDS.

N. Y. COURT OF APPEALS.

Berry et al., respts., v. Brown, applt.

Decided Nov. 29, 1887.

One Z. sold out his interest in a partnership to defendant's wife, she agreeing to pay the debts and release him. In an action by creditors of the firm Z. testified that defendant said he should be relieved from all indebtedness and that he "would see that the creditors were paid." *Held*, That the burden was on plaintiffs to show that defendant agreed for himself to be personally bound to pay the firm debts; that as the sale was not made to him and no consideration passed to him plaintiffs could not enforce such agreement, if made, against him, and that the alleged agreement not being in writing was invalid under the statute of frauds.

Reversing S. C., 22 W. D., 108.

This action was brought by plaintiffs who held claims against the firm of Z. & Co., which firm was composed of Z. & M. A. B., defendant's wife. Plaintiffs claimed that defendant has assumed payment of their claim. It appeared that the business of the firm of Z. & Co. was conducted until Jan., 1881, when defendant opened negotiations with Z. for the sale of his interest in the firm. On Jan. 11, 1881, a written agreement was executed by which Z. sold out all his interest in the firm business and assets to M. A. B.,

she agreeing to pay him \$300 and to allow him to retain \$700 of the firm funds which he had misappropriated, and to assume and pay all the debts of the firm. It was under seal and was signed M. A. B., per A. B., defendant, attorney in fact, and then by Z. It was acknowledged by defendant as attorney for his wife, and by Z. before a notary public. It was read over to Z. and he testified that he understood it. He objected to some of the language used and looked it over himself. Defendant and the attorney who drew the agreement testified that it expressed truly the whole agreement between the parties. Z. was permitted to testify that he did not understand it as written and understood that he was making the sale to K. & Co., although that name did not appear in the writing and was not mentioned at the time it was signed. Z. did not testify that he made the sale to defendant or that he understood he made it to him. He swore that K. & Co. were to assume and pay the firm debts, and that defendant said before the agreement was executed that Z. "should be relieved from all indebtedness of the firm" and that he "would see that the creditors were paid."

Joseph H. Choate and James F. Gluck, for applt.

Spencer Clinton, for respts.

Held, That the burden was upon the plaintiffs to show that defendant agreed for himself to be personally bound to pay the firm debts; that there was nothing in the evidence to show this; that if

such evidence had been introduced, as the sale was not made to defendant and no consideration passed to him, these plaintiffs, strangers to the agreement, cannot enforce it against him. 55 N. Y., 270; 68 id., 355.

Also held, That the agreement imputed to the defendant not being in writing is invalid under the statute of frauds. It matters not that there was a consideration of harm to Z. from his transfer of the property, there being no consideration of benefit to defendant. 21 N. Y., 412; 75 id., 446.

Judgment of General Term, affirming judgment for plaintiffs, reversed, and new trial granted.

Opinion by *Earl, J.* All concur.

INJUNCTION. BLASTING.

N. Y. COMMON PLEAS. GENERAL TERM.

George W. Rogers, *respt.*, v. De Witt C. Hanfield et al., *appls.*

Decided Dec. 5, 1887.

The city ordinances in regard to blasting are for the protection of the general public, and though complied with, a court of equity may go further, and where special circumstances exist, compel the excavator to carry on his work without imperiling adjacent buildings.

Appeal from order continuing injunction.

Plaintiff was the owner of land upon which he was erecting buildings, which had progressed to the first tier of beams. Defendants were blasting rock in adjacent premises, and plaintiff alleged in his affidavits that large masses of loose rock were, by defendants' negligent conduct of their work,

thrown into the cellar of his building, to his great detriment and injury; that defendants threaten to continue blasting with the same disregard of his rights, and that plaintiff fears irreparable injury. Defendants deny all malice as well as the fact of substantial injury to plaintiff. The injunction was granted *pendente lite*, to restrain defendants from so blasting on their said premises "that any rock so blasted shall fall or be thrown upon the premises of the plaintiff or said premises be in any way injured." Counsel for defendants relied on the city ordinances relative to blasting and defendants' compliance therewith.

G. H. Forster, for appls.

W. Gregg, for resp't.

Held, That the ordinance is for the protection of the general public, without regard to particular circumstances; but a court of equity may go further and, when the special reason exists, compel the excavator to carry on the blasting without imperiling adjacent buildings. This he may do by using additional precautions, and it is no answer that more time and expense will be required. The plaintiff has adequate cause to fear irreparable injury.

N. Y. Printing, etc., Est. v. Fitch, 1 Paige, 96, distinguished.

In support of its position the court cited High on Inj., § 707; 89 N. Y., 493; 29 Hun, 574; 7 id., 175; 16 Abb. N. C., 359.

Order affirmed, with costs.

Opinion by *Larremore*, Ch. J.; *Van Hoesen* and *Bookstaver*, JJ., concur.

STOCKHOLDERS. LAW OF 1875.

N. Y. COMMON PLEAS. GENERAL TERM.

Alice Richards, applt., v. *John H. Beach*, resp't.

Decided Dec. 5, 1887.

In an action against a stockholder in a corporation formed under the limited liability act of 1875, to charge him with a debt of the company, on the ground of failure to fully pay up his stock and that the stock of the company was not paid in full, it must appear that plaintiff's claim is not only in judgment, but that execution has issued against the company and been returned unsatisfied.

Appeal from order of General Term of City Court, sustaining demurrer to complaint.

The complaint showed that plaintiff was an employee of The American Opera Company, limited, a corporation organized under Laws of 1875, Chap. 611; that she sought to hold defendant liable for a debt due her by said corporation for services, on the ground that at the time such debt was contracted defendant was a stockholder of the company, and that he has not paid the whole of his subscription therefor, and that the whole of the capital stock has not been paid in. The complaint alleged that judgment had been recovered against the company, but it did not appear therefrom that execution had issued thereon. Defendant demurred on the ground that facts showing a cause of action were not pleaded.

W. W. Badger, for applt.

George W. Cotterill, for resp't.

Held, That the demurrer should be sustained. The law of 1875, in-

interpreting it as a whole and giving effect to every part of it, requires the obtaining of judgment and issue and return of execution unsatisfied as conditions precedent to the arising of the special and peculiar remedies against stockholders individually.

Order affirmed, with costs.

Opinion by *Larremore, Ch. J.*; *Daly* and *Van Hoesen, JJ.* concur.

AGENCY. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

J. Emery Jones, *respt.*, v. Joseph Eaton et al., *appls.*

Decided Oct., 1887.

Defendant formed a copartnership for carrying on the milling and flour business and leased of the wife of E., one of the copartners, her grist mill. Plaintiff supplied to E. shafting, etc., to be used in the mill, and charged the same to him, without being aware of the copartnership. *Held*, That it was competent for defendants to show that it was understood or agreed between E.'s wife and the firm that she should change the grist mill into a roller roll and put in the necessary machinery, etc., and make the needed repairs, in order to put the mill into running order, and that in ordering the machinery from plaintiff he was acting as her agent and not as a copartner.

Appeal by defendants Blackall and Sperry from judgment entered upon report of a referee.

Action for labor and materials furnished in changing a grist mill occupied by defendants into a roller mill. In July, 1884, defendants formed a copartnership for carrying on the milling and flouring business, and leased of Catherine Eaton her grist mill. Cath-

erine was the wife of defendant Eaton, who acted as her agent in making the lease. Eaton then engaged one R. to change the mill into a roller mill, and told him to procure shafting and machinery of plaintiff and have the same charged to him, which was accordingly done, but learning afterward that there was a firm he charged the same to Eaton & Blackall.

Defendants endeavored to show, by Eaton, that there was an understanding or agreement between the defendant firm and Mrs. Eaton, or her representatives, about putting the mill in running order. Objected to as incompetent, plaintiff not being present or knowing of it and excluded.

Defendant Sperry was asked as a witness, "Was anything said at the time of leasing the mill in reference to putting in new machinery and making repairs in order to put the mill in running shape?" Excluded as incompetent, etc. "Was anything said in relation to putting in new machinery and making repairs in order to put the mill into running shape, at the time of the execution of the lease or subsequent thereto and before the performance of the work by plaintiff, between Mr. or Mrs. Eaton and yourself? A. Yes. Q. Go on and state the substance of that conversation." Excluded as incompetent and hearsay.

John F. Kinney, for *appls.*

Morgan & French, for *respt.*

Held, Error. There is no claim that the work was performed or

materials furnished by reason of any personal interview that plaintiff had with either of the defendants. He himself admits that he did not know of the existence of the firm and that he charged the work to Eaton. There is consequently no element of estoppel in the case. If, therefore, defendants could have shown that the work was performed and material furnished for Mrs. Eaton, the owner of the mill, as alleged in the answer, they had the right to do so, and thus relieve themselves from responsibility. The lease is silent upon the question. The change in the machinery of the mill was made immediately after the forming of the copartnership and the leasing by defendants. The alterations that were made were important and of a permanent character. The case was only for the term of two years. If defendants could have shown that there was an agreement between them and Mrs. Eaton, by which she was to change the machinery in the mill at her own expense, in the absence of any facts or circumstances raising an estoppel, or any agreement on their part with plaintiff, they had the right to do so and have that fact considered by the referee as bearing upon the question of their liability.

Plaintiff was permitted to testify under objection to a conversation with R., the millwright, who ordered the machinery in the name of Eaton, at a time subsequent to such order, in reference to their being a firm and his supposition that the work was for the firm.

Held, That the conversation was no part of the *res gestae*; defendants were not present, and it should have been excluded.

Judgment reversed and new trial ordered.

Opinion by *Haight, J.*; *Smith, P.J.*, *Barker* and *Bradley, JJ.* concur.

PRACTICE. REFERENCE.

N. Y. COMMON PLEAS. GENERAL TERM.

Marcella T. Crook et al., admrs, *respts.*, v. Samuel H. Crook, *applt.*

Decided Dec. 5, 1887.

Where the whole issue is of fact and is tried by a referee, judgment may be entered upon filing his report with the clerk of the court, without service of a copy upon the attorney for the opposite party.

The court has no power to extend the time to appeal, when properly limited by service of judgment and notice of entry, and such time has expired.

Appeal from order.

Action to have defendant Crook declared trustee of a lease, etc.

The referee to whom it was referred to determine all the issues, duly reported, and directed judgment for plaintiff. No copy of the referee's report was served upon the attorney of record for defendant, but a copy was served on counsel for defendants, who admitted service in the name of said attorney, but whose authority so to do was disputed on this application. Thereafter judgment was entered upon the report, and a copy thereof with notice of entry, was, as the court found, duly

served on the attorney of record for defendant. Negotiations for a settlement including an abandonment of the appeal by defendant were then entered upon, but never consummated, and no settlement was reached. No notice of appeal was served, and after the time to appeal had expired this application was made by defendant Crook, for an order that plaintiff serve defendant's attorney with a copy of the referee's report and the judgment entered thereon; that defendant have ten days from such service to make, file and serve exceptions to the report; that he be allowed thirty days from service of said judgment in which to serve notice of appeal, and that plaintiff's attorney be required to accept the same. From a denial of this application this appeal is taken.

A. B. Tappen, for applt.

L. Johnston, for respts.

Held, That the manner of the service of the referee's report was immaterial. In such a case judgment may be entered upon the report of the referee, upon filing the same with the clerk, without service of a copy thereof on the attorney for the opposite party. § 1228, Code Civ. Pro.

The judgment and notice of entry having been duly served on defendant his time to appeal was thereby limited, and the court has no power now to extend it. 24 Hun, 642; 27 id., 384; 8 Civ. Pro., 87; 97 N. Y., 610.

Order affirmed, with costs.

Opinion by *Larremore*, *Ch. J.*; *Daly* and *Van Hoesen*, *JJ.*, concur.

CONVERSION. ELECTION OF REMEDIES.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

George R. Boots v. Charles Ferguson et al.

Decided Oct., 1887.

In an action against defendants as commissioners of highways to recover the sum stipulated for constructing a bridge in pursuance of a contract, the plaintiff was defeated upon the ground that the action was barred by the statute of limitations. Subsequent to the commencement of the action, but before service of the complaint, plaintiff became aware that defendants had converted the property by a sale and delivery of the materials composing the bridge to a third person. After the unsuccessful termination of that suit, plaintiff brought this action for the conversion. *Held*, That plaintiff having elected to continue the prosecution of his action upon the contract, with cognizance of the conversion of the property, was thereafter precluded from resorting to an action of tort; the remedies are inconsistent, and plaintiff having made his election, he is confined to the one he first preferred and adopted and cannot afterward resort to the other, although unsuccessful in the first.

Motion for new trial on exceptions taken at the trial and ordered heard at General Term in the first instance.

Action to recover damages for conversion of a quantity of lumber and timber. Defendants are commissioners of highways of the town of Gorham. In 1873 the commissioners of highways entered into a contract with plaintiff's assignor for the building of a bridge for \$1,000, which they refused to pay, and thereupon plaintiff brought an action against them individually, but was defeated up-

on the ground that the commissioners were not liable in their individual capacity. Thereafter, in 1879, the commissioners of highways caused the bridge to be taken down and the material to be sold. Plaintiff saw the material of the bridge in Dec., 1879, on the bank of the creek, and in May following he saw it in the possession of the persons to whom it had been sold. In Feb., 1880, he brought another action against the highway commissioners of the town for the contract price of the bridge; the complaint was verified June 11, 1880. The court found that plaintiff had fully performed the contract on his part, but that his claim was barred by the statute of limitations. Then this action was brought for conversion. The question was, whether the bringing of the former action and prosecuting the same to judgment precluded plaintiff from maintaining an action for conversion of the property which was the subject of the contract. A verdict was directed in favor of defendants.

Edwin Hicks, for plff.

W. H. Adams, for defts.

Held, That plaintiff having elected to prosecute his action upon the contract, being cognizant of the conversion of the property, was thereafter precluded from resorting to the remedy by action of tort.

The rule is, that where there exists an election between two inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. That the remedies are not concurrent, and

where the choice between them is once made, the right to follow the other is forever gone. 36 Hun, 513; 4 id., 351; 3 Johns. Ch., 416; 34 N. Y., 473; 51 id., 174; 81 id., 239; 18 id., 552.

It is contended, however, that the rule as to election of remedies obtains only in the case of sale of goods where the title passes subject to be defeated for fraud; or where the plaintiff had obtained possession of the property, or some benefit to himself in relation thereto, either by judgment in his favor, or by the enforcement of a provisional remedy in the action.

Held, Untenable. 46 N. Y., 354; 33 Hun, 169; 103 N. Y., 25.

Stowell v. Chamberlain, 60 N. Y., 272, explained and distinguished.

Plaintiff prosecuted the action against the highway commissioners after he knew of the conversion of the material composing the bridge. That action was founded upon the contract, with the allegation that the bridge had been fully completed and accepted by the commissioners: in other words, that the title thereto had vested in the town. That action is inconsistent with this, for the reason that this proceeds upon the theory that the title to the bridge remained in plaintiff. Plaintiff, therefore, by bringing the former action and prosecuting the same to judgment, with full knowledge of all the facts, must be deemed to have made his election of remedies, and having done so his right to maintain the present action is gone.

Motion denied, and judgment directed for defendants.

Opinion by *Haight, J.; Barker and Bradley, JJ.*, concur in result; *Smith, P. J.*, taking no part.

MANDAMUS. ELECTIONS.

N. Y. COURT OF APPEALS.

The People ex rel. McMackin et al. v. The Board of Police.

Decided Oct. 25, 1887.

The granting or refusing of a writ of mandamus, especially when it is asked against public officers to compel the performance of an alleged public duty, is somewhat a matter of discretion.

Where there were three different bodies each claiming to be the sole representative of the party entitled to the appointment of additional inspectors of election. *Held*, That as there were disputed questions of fact an application for a mandamus to compel the appointment of inspectors from one of said bodies should not be granted.

On Sept. 24, 1887, the relator, representing the United Labor Party, obtained an order to show cause why a peremptory writ of mandamus should not be issued in the first instance and directed to the board of police commissioners of the city of New York and to each and every of said commissioners, requiring the said board forthwith to convene and appoint as additional inspectors of election in each and every election district of said city the persons appointed by McClave, one of said commissioners, Sept. 16, 1887. The relators claim to be the representatives of a constituency of over fifty thousand voters in the city of New York, and that Chap. 490, Laws of 1887, provides for the appointment of inspectors of elections. The record shows that there were three different bodies,

each claiming to be the sole and proper representative of the party entitled to the appointment of the additional inspectors. The application was denied.

Edward M. Shepard, for applts.

E. Ellery Anderson, for respt.

Held, No error, as there were disputed questions of fact which authorized the denial of the application.

In a case like the present the court will not be driven into issuing a peremptory writ to guide the conduct of public officers charged with this public duty upon any narrow construction of a return to its alternative writ, where, from all the papers it appears that there is a substantial issue of fact, of a material nature, which should be decided in the way pointed out by the law for the issuing of such writ. In such cases it is a wise and proper exercise of discretion to refuse the application.

The remedy by mandamus is of an exceptional character and the writ issues only in that class of cases where a clear legal right is made to appear, and there is no other adequate and legal means to obtain it. The granting or refusing the writ, especially when it is asked against public officers to compel the performance of an alleged public duty, is somewhat a matter of discretion.

Order of General Term, affirming order denying application, affirmed.

Opinion by *Peckham, J.* All concur.

FRAUDULENT CONVEYANCE. HUSBAND AND WIFE.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

George W. Doty, *applt.*, v. Francis M. Clint, *impl'd.*, *respt.*

Decided Oct., 1887.

A husband being utterly insolvent to the knowledge of the wife conveyed to her a farm and also executed to her a chattel mortgage as security for money loaned, the debt exceeding the value of the whole property, with intent to give her a preference over other creditors, and in pursuance of a written agreement made long prior thereto to give her security. *Held*, That the referee was warranted in finding from the evidence that the conveyance was not made with a fraudulent intent to cheat, hinder or delay creditors, and that the wife was not a party to any such fraudulent scheme.

The debt to the wife being an honest one, the husband had a right to prefer her, and there being no fraudulent intent on her part, she should be protected.

The conveyance being given for a just debt, is not rendered fraudulent by including interest not collectible at law.

Appeal from judgment entered upon report of referee.

Action to set aside a conveyance as having been made in fraud of creditors. The referee found the following facts: Defendant's husband, in Feb., 1873, purchased a farm, and about the same time her mother advanced to her \$550 upon an agreement between defendant, her husband and mother, that he should secure and pay the amount to his wife. During ten years, ending in 1880, the mother received a pension of \$96 yearly, all of which she gave to defendant, who loaned the same to her husband upon his agreement to secure

her, the whole amounting to \$960. In April, 1873, he executed an agreement to her "to give a mortgage on real estate for borrowed money as soon as I can pay what is now against the place." In Nov., 1882, the husband exchanged farms with S., and in Dec., 1884, he exchanged the S. farm for a farm in Minnesota, which was conveyed to defendant, who gave her promissory note for \$600, being the difference between the estimated values of the respective farms, and secured the same by a mortgage upon the farm purchased. The conveyance to her was in pursuance of an agreement between them that the land should be conveyed to her as security for the money loaned. About the same time the husband gave her a chattel mortgage as further security, and afterward conveyed the chattels to her absolutely. He had no other property, and was then in debt to plaintiff, upon which judgments were recovered, executions issued and returned *nulla bona*. He was also indebted to other persons in considerable sums, and was utterly insolvent, as defendant well knew. She was aware that the property, after paying her, would not be sufficient to pay the other indebtedness. It was his intention to prefer his wife over the other creditors. The indebtedness to defendant exceeded the value of the Minnesota land and the property covered by the chattel mortgage.

The referee refused to find that the husband caused the Minnesota land to be conveyed to defendant

with intent to cheat, defraud and hinder plaintiff from collecting his claims, or that she shared in his fraudulent intentions in not paying his debts in putting the property in her hands, or that she had any notice of any fraudulent intent on his part to defraud his creditors, or that she took the deed with guilty knowledge of his fraudulent intent, or that she participated in and aided his fraudulent intent, or that the conveyance or the chattel mortgage was taken by her to aid in a fraudulent intent. In short, he refused to find fraud on the part of defendant, or that she in any way aided her husband in any scheme to defraud creditors. The referee found as a conclusion of law that the complaint should be dismissed.

J. D. Decker, for applt.

F. M. Dunning, for respt.

Held, That the findings of the referee were warranted by the evidence, and the requests to find contrary thereto were properly refused.

The referee, after seeing the witnesses and hearing their testimony, determined the questions of fraud in defendant's favor, and this court will not disturb his findings. 41 Hun, 243; 17 W. Dig., 252.

The debt to the wife being an honest one, he had a right to prefer her. 17 W. Dig., 81; 30 Hun, 192; 101 N. Y., 232.

The conveyance being given for a just debt is not rendered fraudulent by including interest not collectible at law. 10 N. Y., 202.

The debt being honest, and there

being no fraudulent intent on the part of the wife, she should be protected. 85 N. Y., 421.

Judgment affirmed.

Opinion by *Corlett J.*; *Haight* and *Bradley, JJ.*, concur.

EXAMINATION OF PARTY.

N. Y. COMMON PLEAS. GENERAL TERM.

Noble B. Judah, assignee, *respt.*,
v. Charles H. Lane, *applt.*

Decided Dec. 5, 1887.

Where it appears by plaintiff's uncontradicted affidavits that defendant was employed by plaintiff, as a broker, under a discretionary power to buy and sell shares of stock, etc.; that plaintiff, on defendant's demand advanced large sums ostensibly for margins, and suffered great loss by the transactions; that defendant made false reports to plaintiff charging him more than market prices for purchases, and crediting him with less than market price on sales, and that this is corroborated by records of the exchanges, etc. *Held*, That in view of the nature of defendant's employment he was the only person acquainted with the special facts, and plaintiff was entitled to an order for his examination to enable him to frame his complaint.

It is no valid objection to the granting of such an order that the papers allege facts which show more than one cause of action, or more than one theory of recovery; nor is it a good objection to the granting of such an order for examination of defendant that "its tendency might be to criminate him or make him liable to a penalty or forfeiture."

Appeal from order granting an examination of defendant before trial.

The summons was served, and plaintiff asked the examination

to enable him to frame his complaint. It appeared from plaintiff's affidavits, which were uncontradicted, that he was the assignee for benefit of creditors of one Marsh, who had theretofore employed defendant as broker under a discretionary power to buy and sell shares of stock and wheat; that plaintiff's assignor had paid defendant various sums to be used as margins; that defendant rendered reports of said alleged operations, the final result of which was that said assignor suffered losses aggregating \$150,000; that in said transactions defendant falsely reported purchases and sales when none took place, and the records of the exchanges are cited in corroboration; that defendant charged said assignor more than market value on purchases and credited him less than such value on sales; and plaintiff's assertions were borne out by all the facts he was able to discover. The affidavits allege ignorance by plaintiff of the names of parties with whom these transactions were had by defendant, etc., etc.

Divers objections were made to the application.

J. Henry Dewey, for applt.

W. A. Jenner, for respt.

Held, That (1) it is no valid objection that the papers allege the existence of facts which would entitle plaintiff to more than one cause of action, or more than one theory or ground upon which relief might be demanded. (2) The facts rendering the examination material and necessary are amply set forth. The facts adduced tend

to show that defendant's reports were false, but the only statement of the actual transactions is contained in his books. Defendant acted as Marsh's broker under a discretionary power to buy and sell, and is therefore the only person acquainted with the precise facts. 59 How., 321. (3) Defendant cannot evade the examination on the ground that "its tendency might be to criminate him or make him liable to a penalty or forfeiture." This is distinguishable from his privilege as to specific questions on such examination.

So much of the order as provides for the examination of defendant affirmed, with costs.

Opinion by *Larremore, Ch. J.*; *Daly* and *Van Hoesen, JJ.*, concur.

DURESS. LIMITATION.

N. Y. COURT OF APPEALS.

Schoener et al., applts., v. Lissauer et al., respts.

Decided Oct. 11, 1887.

Defendants had an employee arrested for embezzlement and demanded money of his relatives, threatening to send him to prison unless it was paid. The threats being communicated by arrangement with defendants to the boy's mother she gave a mortgage to them, under the influence of fear induced by such threats. *Held*, That the mortgage was void, and that a proper case was made for its removal as a cloud on title.

The limitation of six years provided by § 882, subd. 5 of the Code does not apply to such a case, but the right of the owner to maintain such an action is never barred by the statute so long as the cloud continues to exist.

Reversing S. C., 21 W. Dig., 480.

This action was brought by the heirs-at-law of B. to procure the cancellation and discharge of a mortgage executed by her on her real estate in May, 1873, and duly recorded and held by the defendants. B. died Sept. 22, 1879. No attempt had been made in her lifetime to enforce the mortgage. This action was commenced Sept. 29, 1879, and was sought to be maintained on the ground that the execution of the mortgage had been procured by duress. The trial court found that B. had executed the mortgage on account of the threats and menaces of defendants that unless she gave such mortgage they would cause her son to be sent to the State prison for the offense of larceny and embezzlement, which they charged him with having committed against them when in their employ, and for which he was under arrest and indictment on their complaint and about to be tried; that they stated to the sister and brother-in-law of the prisoner that he could regain his freedom in no other way than by the payment of \$2,000, and if that sum was not paid he would certainly have to go to State prison; that after negotiation the defendants communicated to the prisoner's mother, through his sister, a statement that he would be sent to State prison unless the mother would pay \$1,000 in cash and give a mortgage for \$1,000 on the premises in question, the defendants agreeing not to harass her for said mortgage during her lifetime, and if these terms were agreed with that they would release

the prisoner if in their power, if not, he would be sent to State prison; that B. after a long struggle consented to the terms and executed the mortgage, and paid the \$1,000 in cash while under the influence of fear, terror, coercion and duress created by the threats of the defendants, and believing that they would be carried into execution, and the prisoner who was immediately discharged on his own recognizance. The Special Term rendered judgment directing the cancellation of the mortgage and requiring the defendants to discharge it of record.

Louis Marshall, for appls.

Julius Lipman, for respts.

Held, No error; that the case made by the complaint and findings was a proper one for the removal of a cloud upon the title of the plaintiffs' real estate; that the mortgage was an apparent lien upon their title, and the facts which constituted their defense to it could only be established by extrinsic evidence. 4 Giff., 638; L. R., 1 H. L. C., 200; L. R., 8 Ch. Div., 469; 82 N. Y., 393; 102 id., 372.

The limitation of six years applied by § 382 of the Code, subd. 5, to actions "to procure a judgment other than for a sum of money on the ground of fraud, in a case which on the 31st day of Dec., 1846, was cognizable by the Court of Chancery," does not apply to an action like the present one to remove a cloud upon a title to land.

The right of the owner to invoke the aid of a court of equity to re-

move a cloud upon the title to land is never barred by the statute of limitations so long as the cloud continues to exist. 50 N. Y., 337.

Order of General Term, reversing judgment for plaintiff, reversed, and judgment affirmed.

Opinion by *Rapallo, J.* All concur.

RAILROADS. CONSTITUTIONAL LAW.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People v. John O'Brien, recr., et al.

Decided Sept., 1887.

Chapter 268, Laws of 1886, repealing the charter of the Broadway Surface RR. Co. and dissolving the corporation, and Chap. 810 of the same year, are constitutional and valid.

The railroad proper and its franchise were not destroyed by Chap. 268, but passed as a legal estate charged with the mortgages and other legal burdens to the directors of the company as trustees for the creditors and stockholders; and such trust was transferred to the receiver under Chap. 810.

A franchise which is not simply the bounty of the State, but is also dependent on contracts with property owners and cities is perpetual.

Chapter 271, Laws of 1886, providing for the sale of the consents of the property owners and the city and §§ 5, etc., of Chap. 810 of same year, in relation to evidence of claims, are unconstitutional.

The Broadway Surface RR. Co. was incorporated under Chap. 252, Laws of 1884, on May 12, 1884. On May 17, 1884, it entered into agreements with the Broadway & Seventh Avenue RR. and with the Twenty-Third Street RR. by which these companies were to be

allowed to run cars on its tracks and in return these companies guaranteed bonds of the Broadway RR. in all to the extent of \$1,500,000; the proceeds of the bonds were to be used to finish the Broadway RR. These contracts were to last during the entire corporate terms of the several roads. The Broadway RR. obtained the consent of some property holders to the construction of its road, but not enough; it therefore applied to the common council of New York and in Dec., 1884, a resolution was passed giving consent to the construction upon the payment of a yearly rent, certain percentages upon fares and a limitation upon the amount of fare charged. Thereafter under Chap. 251, Laws of 1884, commissioners were appointed to determine whether the road should be constructed and on March 12, 1885, they reported that it should be. In July, 1884, the Broadway RR. mortgaged all its property and franchises acquired and to be acquired to Wm. H. Hays as trustee to secure \$1,500,000 bonds which were to be used to complete the road.

This mortgage was recorded June 19, 1885. About this latter date it made another mortgage to Francis A. Palmer as trustee to secure \$1,000,000 bonds, these to be used in purchasing stage lines and in completing the road. On July 31, 1884, all the first mortgage bonds and all the stock not subscribed for by the directors, amounting to 9,520 shares, were turned over to Jacob Sharp in consideration of his promise to com-

plete the road in one year, which he did. The several bonds were issued and were guaranteed by the RR. Co. On May 4, 1886, the legislature passed Chap. 268, repealing the charter of the Broadway Surface RR. and dissolving the corporation. It also passed Chap. 271, providing for the sale at public auction of the consent of the property owners and of the common council and that the purchaser, if authorized by law, might go on under them as though he had originally obtained them. It also passed Chap. 310, providing the method of procedure where a charter is repealed. It also passed Chap. 642, providing that when application is made to construct a street surface railroad the franchise must be sold at public auction to him who will give the largest percentage of gross receipts. After Chap. 310 was passed an action was begun to wind up the affair of the company and in it John O'Brien was appointed receiver. In July, 1886, this action, in the nature of an omnibus suit, was begun into which all parties interested came and answered. The court below held in substance that the act repealing the charter was valid; that the bonds were valid and that all the franchises were subject to them; that the act providing for the sale of the franchises and consents was void as to the bond holders. That the so called traffic arrangements or agreements were valid and survived; that the receiver took all the property of the Broadway Co. and should wind it up; that he

took the franchise to run cars in Broadway subject to the mortgages and the traffic arrangements; that the portion of the act of procedure relating to proof of claims, which provides that the receiver is to take the evidence of the claim and which practically limits the court in deciding upon a claim to this evidence taken by the receiver is invalid.

Dennis O'Brien, Atty. Genl., for people, applt.

E. Henry Lacombe, for city of N. Y., applt.

Alexander & Green and *W. C. Gulliver*, for Richmond and other appls.

James C. Carter and *Elihu Root*, for Broadway & Seventh Ave. RR., respt.

Nash & Kingsford and *Charles L. Jones*, for bondholders, respts.

E. W. Paige, for railroad companies, respt.

LANDON, J.—We think Chap. 268, Laws of 1886, is constitutional. Chapter 252, Laws of 1884, subjected the charter of this corporation to § 8 of Chap. 18, Tit. 3, part I, R. S., which latter provides that the charter of every corporation shall be subject to suspension and repeal in the discretion of the legislature. The corporation itself was also made subject to § 48, Chap. 140, Laws of 1850. This section provides that the legislature may at any time annul or dissolve any corporation formed under this act. The act of 1884 also provided for its own alteration or repeal. The legislature had reserved the power to annul the corporation and repeal the

charter and could exercise that power.

In order to determine the rights of the parties we must see by what tenure it held its property and franchises and to do this we must examine whether its original tenure was in any way augmented or qualified. The repealing act destroyed the corporation and its charter and destroyed them instantly. The corporation died therefore in the fullness of its rights and acquisitions. It had obtained during its life property and rights. These survived. This property was of two kinds, corporeal and incorporeal. The corporeal was the railroad in Broadway. It had also an interest in the soil of the surface of the street sufficient to enable it to construct the road. This latter carried with it the right both to construct and to maintain. This right to maintain was a franchise, so also was the right to operate. This franchise was in perpetuity. At common law such a franchise was only for life and the grant was made by favor and upon considerations of personal confidence. The statute Chap. 252, Laws of 1884, gives the corporation power to buy and sell real estate (see part 1, Chap. 18, Tit. 3, § 1, R. S.); it may also mortgage, Chap. 140, Laws of 1850, and by Chap. 133, Laws of 1880; it is authorized to construct and maintain its road. Chap. 251, Laws of 1884, § 3. The franchise to construct and maintain was an acquisition subsequent to the creation of the corporation. The distinction between franchises

which are strictly the personal attributes of a corporation and those franchises which pertain to the uses to which its railroad property is fitted is well recognized.

The common law rule of tenure for life has been changed and in the case of surface railroads by Art. 3, § 18 of the State Constitution. We think the rule is that to the extent that the Constitution and statutes have permitted the property franchises to be acquired by purchase instead of solely from the bounty of the State, the tenure depends upon the contract of purchase. And to the extent that the corporation has under statutes entered into contracts binding the property franchise to that extent the personal quality of the franchise has been turned into an assignable quality and the life tenure into a tenure adequate to uphold such contracts.

Section 18, Art. 3, of our Constitution makes necessary to the construction of a street railroad the consent of the owners of one-half in value of the property bounded on it and also the consent of the local authorities. Prior to this provision the title to the bed of the street was in the city in trust for the people. 27 N. Y., 188; 50 id., 206; 27 id., 211. These consents are now necessary and without them a grant is inchoate. The city and property holders are now brought in as parties. The city may impose terms and may sell its consent or franchise at public auction. Chapter 252, Laws of 1884, § 7. Thus the legislature makes the franchise purchasable

property. This contract between the city, the owners and their grantee is thus authorized and the State is a consenting party. The State cannot impair its contract. United States Constitution, Art. 1, § 10. The consent of the city was given. The railroad promised to pay \$40,000 a year, 3 per cent. of its earning for five years and 5 per cent. thereafter. This consent was formally accepted by the company. No term of time was fixed in the consent. The consent and acceptance are a contract. There has been no default. Prior to the amendment of the Constitution in 1875 (*supra*) the effect of such a contract has been considered and held to be a grant of an irrevocable property interest in the street and of the franchise to construct and maintain. 27 N. Y., 611; 32 id., 261; 14 id., 506; 9 id., 263. The real estate and franchise have been held assignable in many cases. 89 N. Y., 75; 58 id., 75; 58 id., 61; 114 U. S., 501; 93 id., 217; 6 Wall., 750; 112 U. S., 629; 105 id., 13; 21 How., U. S., 112; 21 Law Rep., 138.

The Constitution of 1875 having authorized the grant of the real estate and franchise, both are bound by the tenure of the grant and perpetually bound, 27 N. Y., 611, there having been no default in the payment of the rent or any non-performance of the conditions prescribed by Chap. 252, Laws of 1884, and by the contract.

This franchise has been mortgaged and legally. This imports a term adequate to support the mortgage. Upon default the

property and franchises could be sold. Several acts provide methods. Chapter 282, Laws of 1854; Chap. 444, Laws of 1857; Chap. 469, Laws of 1873; Chap. 710, Laws of 1873; Chap. 430, Laws of 1874; Chap. 446, Laws of 1876; Chap. 113, Laws of 1880. They may not be strictly applicable to a street railroad, but they indicate the policy of the State to make railroad property and franchises as available in the hands of the purchaser as in the hands of the first holder. And § 15, Chap. 252, Laws of 1884, provides for the lease or transfer by one street railroad to another of a right to run upon or use any portion of the street railroad tracks. This implies the assignability of the franchise to the extent necessary to uphold such lease. Section 48, Chap. 140, Laws of 1850, the only statute which in terms authorizes the legislature to annul or dissolve any incorporation formed *under* the act, as distinguished from *by* the act itself, has a saving clause which provides that such dissolution shall not impair any remedy given against such corporation for any liability previously incurred. If the remedy is to enforce the contract which binds the property franchise such franchise must survive.

We think therefore that upon the dissolution of the corporation the railroad and the franchise to construct, maintain and operate it was not destroyed or impaired but passed as a legal estate charged with the mortgages and burdens legally placed thereon to the di-

rectors of the Broadway Surface RR. Co. as trustees of the creditors and stockholders of the company. 1 R. S. m. p. 600, § 9.

Chapter 310, Laws of 1886, provided that this trust should be transferred from the directors to the receiver. The receiver has been regularly appointed and no motion has been made to vacate his appointment. The substitution of one trustee for another does not affect any vested legal rights and we think the receiver holds by a valid title.

All the liens upon the property and franchise are as valid against the receiver as they were against the company. If the company acquired the benefit of the contracts and orders whereby the consents of the city and property owners were vested in the company the same benefit is vested in the receiver for the benefit of the stockholders and creditors. The legislature could not vest in the receiver any right to divest this estate of any consents, rights or property and bestow them upon the city or State except upon compensation. We conclude that Chap. 271, Laws of 1886, so far as it provides for the sale of the consents of the city and property owners is void.

We do not think it proper in this action to consider the questions made concerning the traffic contracts. Only the city, the people and the receiver assert that they are void. The action is to wind up the affairs of the dissolved corporation. The parties interested in supporting the traffic con-

tracts may have defences which they are entitled to try by jury and which cannot well be considered in this action.

We think that part of § 5, and subsequent sections of Chap. 310, Laws of 1886, which makes it the duty of the judge to examine the list of claims presented "together with such evidence as the receiver has taken," etc., is unconstitutional. The court is bound by the evidence taken by the receiver. This makes the receiver the officer to take the evidence and does not permit any evidence to be taken by any disinterested officer. This is not due process of law.

Judgment affirmed, without prejudice to any action the attorney general may bring with regard to the traffic contracts.

Bockes, J., concurs in result. *Learned, P.J.*, concurs, except that he holds Chap. 268, Laws of 1886, to be unconstitutional.

PLEADING. EVIDENCE.

N. Y. COURT OF APPEALS.

Groot et al., *respls.*, v. Agens, *applt.*

Decided Oct. 25, 1887.

The answer set up nonjoinder of one H. plaintiff, alleging that he was a partner with plaintiffs and was living when the action was commenced. *Held*, That proof of H.'s death at the date of the trial was admissible and a complete answer to the plea in abatement.

This action contains two counts, one for the purchase and sale of stocks and advance of moneys and for commissions and interest, such purchases and sales having been

made at the request of the defendant, whereby the latter had become indebted to the plaintiff in the amount claimed. The other account was for the same amount upon the account stated. The answer served pleaded the non-joinder of one H. as a party plaintiff, alleging that he was a partner and jointly interested with the plaintiffs in the demand sued upon, and was living when the action was commenced. Upon the trial plaintiffs' counsel, for the purpose of defeating the plea in abatement, asked a witness if H. was dead. Defendants' counsel excepted on the ground that "the matters arising subsequent to the commencement of this action and not in discharge of the indebtedness therein created are not admissible, especially when, as in this case, a plea of abatement was interposed by reason of the fact that Mr. Hopper was living at the time when the answer was served." The objection was overruled, and defendant excepted and now claims that since the referee found as a fact that Hopper was dead at the date of the commencement of the action, the plea in abatement could not be defeated by the evidence objected to.

Thomas Darlington, for applt,
Fithian & Clark, for respts.

Held, That the objection was properly overruled; that it was unsound on its face, the question objected to not asking for a matter arising subsequent to the commencement of the action, but for an existing fact irrespective of when it arose or occurred, and the

plea did not allege as the objection assumes that Hopper was living when the answer was served; that proof of Hopper's death at the date of the trial was admissible and a complete answer to the plea in abatement.

Judgment of General Term, affirming judgment on report of referee for plaintiffs, affirmed.

Opinion by *Finch, J.* All concur.

NEGOTIABLE PAPER. WAGER CONTRACT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Hudson G. Bottum et al, *respts.*,
v. John Scott, *applt.*

Decided Oct. 26, 1887.

The burden of showing that the promissory note sued on is invalid for any cause is upon the defendant.

A defense that the contract on which the note was given was a wager contract does not dispense with proof to substantiate the defense.

The court cannot be required to reiterate in different verbiage propositions which it has already charged.

Appeal from judgment entered on verdict and from order denying motion for a new trial.

Action on a promissory note. The answer admitted the making and delivery of the note, but alleged that plaintiffs represented to defendant that they had sold for him and purchased for him large amounts of wheat and corn, and that they had closed out such contracts at a loss of the amount of the note; that such pretended losses were the only consideration for the note; that plaintiffs never

sold or purchased any grain for defendant, that no grain was ever delivered to him, but that it was the intention of both parties that none should be delivered but that defendant was to pay the differences and that the transaction was fictitious and a wager on the price of wheat and corn.

The court refused to dismiss the complaint and charged that the burden of proof to establish the illegality of the transaction was on defendant.

Ira D. Warren, for applt.

W. S. Logan, for respts.

Held, No error. That the presumption is that the note is a valid obligation, given for a good and legal consideration, and that the burthen of attacking it for any cause is upon defendant. 70 N. Y., 202; 71 id., 420; 77 id., 612; 83 id., 92; 110 U. S., 508. There was therefore no ground for dismissing the complaint, and the case was properly submitted to the jury.

The court charged that there was no evidence that plaintiffs ever made any contract with any person that bound them to receive or deliver any grain; and if the jury was satisfied that there was no such valid contract defendant was entitled to a verdict; that if the arrangement was that defendant was to pay the differences and was not to receive or deliver any grain on his contract he was entitled to a verdict; that if they were satisfied from the evidence that no such valid contract was entered into, although the accounts were rendered in the way in which

they were, defendant was entitled to a verdict. Defendant's counsel requested the court to charge that there was no evidence that plaintiffs ever made a contract with any person on defendant's account that bound him to receive or deliver any grain. This was charged. He also requested a charge that unless there was such a valid contract defendant is entitled to a verdict. This the court refused to charge otherwise than as already charged.

Held, No error. The court had already charged that if no valid contract had been entered into defendant was not liable, and that proposition had been charged in many ways. I do not understand that it is incumbent upon the court to reiterate in different verbiage the propositions which it has already charged.

In *Bigelow v. Benedict*, 70 N. Y., 202, it was held that a contract whereby A. for a valuable consideration agrees to purchase of B. gold coin at a specified price within a specified time, B. having the option to deliver or not, is not upon its face a wager contract within the meaning of the statutory provision declaring such contracts void, and that in the absence of evidence to the contrary it will be presumed that the contract was made in good faith with intent on the part of both parties to perform. 71 N. Y., 420; 83 id., 99; 108 U. S., 269.

In this case the defense that the contract was a wager contract is pleaded, but that defense does not dispense with proof on the part of

defendant to substantiate the defense. Inasmuch as the case was submitted to the jury on conflicting evidence with proper instructions as to the burden of proof the verdict should stand.

That the verdict should not be set aside as against the weight of evidence. The jury were judges as to the question of fact and as to the weight to be given to the testimony of each witness whom they saw and who testified before them.

Judgment affirmed.

Opinion by *Lawrence, J.*; *Bartlett, J.*, concurs.

DIRECTORS. LIMITED LIABILITY COMPANIES.

N. Y. COMMON PLEAS. GENERAL TERM.

Alice Richards, *applt.*, v. Samuel H. Kinsley, *respt.*

Decided Dec. 5, 1887.

In an action by a judgment creditor of a corporation organized under the limited liability act of 1875, against a stockholder thereof, seeking to charge him with the amount of the judgment, on the grounds that the capital stock of the company is not paid in full, it is a sufficient defense that such stockholder is himself a creditor of the company to an amount equaling his stock. But such a defense would not be good in an action against a director for joining in a false annual report.

Appeal from order of General Term of City Court, sustaining interlocutory judgment entered on order overruling demurrer to the answer.

The complaint alleged that de-

fendant, at the times referred to, was a stockholder and director in the American Opera Company, a corporation organized under the Limited Liability Act of 1875; that plaintiff was a judgment creditor of the said company, and plaintiff sought to hold defendant for her said claim under the judgment on the grounds that the stock of the company was not fully paid, and that defendant as director joined in an annual report of said corporation which was false in material particulars. The answer, after certain denials, set up, as a separate defense, that defendant was himself a creditor of said company for money loaned to an amount named, equaling the amount of defendant's stock. To this defense plaintiff demurred on the ground that it was insufficient in law.

W. W. Badger, for *applt.*

Eaton & Lewis, for *respt.*

Held, That the complaint does not set up separate causes of action, but only separate grounds upon which plaintiff seeks to recover the same sum, and the only question is whether the matter demurred to would, if true, furnish a defense to either ground of recovery set up in the complaint.

To the attempt to hold defendant liable for false representations and statements in the report the matter referred to would not afford a defense, for such liability is intended as a penalty for the deceitful acts of the officer. But the matter in the answer would furnish a defense to a liability founded on a non-payment in full of the stock of the company. 8 Cow.,

387; 17 N. Y., 458; 72 id., 100; 90 id., 353.

Order affirmed, with costs of appeal.

Opinion by *Larremore, Ch, J.*; *Daly* and *Van Hoesen, JJ.*, concur.

BRIBERY. EVIDENCE.

N. Y. COURT OF APPEALS.

The People, *respts.*, v. Sharp, *applt.*

Decided Nov. 29, 1887.

On the trial of an indictment for bribery the testimony of defendant given before a committee of the senate appointed to investigate the facts involved in the charges of bribery, defendant being under subpoena, is inadmissible against him. It is not necessary for the protection of defendant under § 79, Penal Code, that defendant should have refused to obey the subpoena or to answer the questions of the committee, the subpoena being compulsory.

Evidence that a year before the offence charged defendant tried to bribe another person is not admissible on the question of intent with which defendant paid the bribe alleged, it being too remote and proof of the commission of one crime is not admissible on the trial for another offence.

Evidence that some of the persons alleged to have been bribed and who were co-defendants were in Canada is inadmissible and irrelevant, the rule that a failure to produce proof which would render material but doubtful facts certain will raise a presumption against the party who omits to do so does not apply unless it appears that such proof is in his power.

On Oct. 19, 1886, defendant was indicted for bribing a member of the common council with intent to influence him in respect to the exercise of his powers and functions as such member, upon the application of the Broadway Sur-

face Railway Co. for the consent of the common council to the construction of a street railway. Defendant was tried separately. Direct evidence was given from which a jury might find that said member had been in fact bribed and other evidence of a circumstantial character, but which the jury have considered sufficient to warrant a verdict of guilty against defendant. Defendant excepted to the admission of certain items of testimony.

First. The prosecution proved that defendant was examined as a witness before a committee of the senate of this State, appointed to investigate among other things the methods of the Broadway Railway Co. in obtaining the consent of the common council and also the action in respect thereto of the board of aldermen which granted, or of any member thereof who voted for the same, and that defendant then gave testimony which the prosecution claimed was "irrefutable evidence of his participation in and complicity in the commission of the crime." This testimony was offered in evidence, it being conceded by the prosecution that defendant, at the time he testified, was before the committee under the operation and compulsion of a subpoena duly issued by it, and that the testimony he gave was in response to questions propounded in their behalf. The testimony offered was objected to as given under privileged circumstances; that defendant was compelled to attend and testify and the evi-

dence thus elicited was not competent "upon the trial of a person where the subject under inquiry is that about which he was then interrogated." The objection was overruled, and an exception taken.

W. Bourke Cockran, Albert Stickney and Edward W. Paige, for applt.

McKenzie Semple, DeLancey Nicoll and George F. Comstock, for respts.

Held, Error; that under the provision of §§ 78, 79 and 712 of the Penal Code, the testimony offered was inadmissible. 24 N. Y., 74.

It appeared by the concessions made upon the trial, that on objection being made to the introduction of defendant's testimony, on the ground that his statements made before the committee were privileged, made under compulsion of a subpoena and the constraint of an oath duly administered by the committee who confined his evidence to such questions as the committee chose to ask, and no suggestion having been made that the senate had full power to take cognizance of and to enquire through its committee into the alleged abuses of public power and corruption of public officers, or that such proceedings were not in every respect valid and legal, the prosecution put the resolution in evidence and then proved acts of defendant to show that he waived his privilege before the committee by not asserting it. The due appointment of the committee or its powers were not questioned. It was claimed on this appeal that "the resolution of the

senate and the inquisition of the committee were illegal and void proceedings, having no significance or force in the judgment of the law."

Held, Untenable; that in view of the facts proved it was too late to raise the question here; that the senate had constitutional power to pass the resolution and its committee had authority to carry it into effect. 99 N. Y., 463.

Kilbourn v. Thompson. 103 N. Y., 176, distinguished.

Also held, That the subpoena and resolution of the senate being compulsory, it was not necessary for the protection of the witness that defendant should either by deed or word set at defiance or refuse to obey the summons, or to answer the questions of the committee.

The legislature intended by § 79 of the Penal Code to cover all cases which involved an inquiry into matters relating to bribery as defined by the various sections of said Code. It being the object of said statute to enable magistrates, grand juries, courts or legislature to make their investigations into alleged abuses effectual and successful and to that end protect witnesses whose testimony might otherwise be withheld, but without which the investigation would fail. Whatever effect may be given to §§ 68 and 69 of the Penal Code, making the refusal of a witness to attend or testify before a legislative committee a misdemeanor or limiting the inquiry to "material and proper questions,"

they cannot be regarded as excluding the operation of §§ 78 and 79. Within the terms of the latter sections every question may be asked which is pertinent to the subject matter.

One P., who was in 1883 the engrossing clerk of the assembly, was called as a witness for the prosecution and testified that defendant desired an alteration of a certain bill then pending before that body, so that its terms might authorize the construction of a railroad on Broadway. For this alteration he proposed to pay the witness \$5,000. This evidence was introduced as part of the affirmative case for the prosecution. It was objected to and the objection overruled and an exception taken.

Held, Error; that evidence was too remote in point of time; that it was not admissible upon the question of the intent with which defendant paid the bribe alleged in the indictment, no such logical and close connection therewith existing as is necessary to render it admissible. 57 N. H., 245, 295; 80 N. Y., 364, 375; that upon the question of motive that is a reason why defendant should commit the crime, the evidence has not the least materiality or bearing; that evidence of defendant's bad character could not be given in anticipation of proof from him and no such issue could be tendered by the prosecution, 14 Wend., 111; 5 Cush., 295; 5 Ohio, 227; 2 Dana, 418; Burr. On Cr. Evi., 533; that proof of defendant's general character would be irrelevant although it might show in a moral sense

that he would be likely to commit the crime with which he was charged; that proof of the commission of one crime is not admissible in evidence on the trial of the same offender for another; no evidence can be admitted which does not tend to prove the issue joined. The indictment is all the defendant is expected to come prepared to answer. 55 N. Y., 81.

Pierson v. People, 79 N. Y., 424, People v. Wood, 8 Park. Cr., 681; People v. Stout, 4 id., 452; Comm. v. Tuckerman, 10 Gray, 173, 199; Comm. v. McCarthy, 119 Mass., 354; Comm. v. Bradford, 126 id., 42; People v. O'Sullivan, 104 N. Y., 481; Comm. v. Abbott, 130 Mass., 472; Comm. v. Jackson, 132 id., 16, distinguished.

One M. who was an alderman at the time of the passage of the resolution testified against defendant's objection that after the consent to the laying of the tracks was given he received \$5,000 from one DeL. The district attorney then asked: "You understood that you received the money on account of the Broadway Surface RR," and the witness answered "No sir, nothing of the kind." On a further examination as to the circumstances and the receipt of the money the witness swore that DeL. gave him a roll of bills "and said, there is something to buy election tickets with." In reply to a question from the district attorney the witness swore that he did not understand that the money was paid on account of the Broadway RR. Co. He was then asked:

"What was your understanding at the time?" This was not only specifically objected to as incompetent against defendant, but also as asking for a conclusion. The objection was overruled and the witness answered that there was no particular understanding about it so far as he was concerned, that "there was nothing said about it." The witness then being asked: "What did you think at the time DeLacy gave it to you for?" answered that he had his misgivings, and on being further questioned said: "I suppose it was for the Broadway road." This was also received under objection.

Held, That the rulings were erroneous; that the first question called for an opinion and from the evidence given the jury might naturally reason that the conclusion of the witness, drawn from all the facts within his knowledge, fairly represented the nature and extent of the connection between the circumstances to which he testified and the fraudulent practices which had preceded it.

The public prosecutor as part of his evidence in chief offered to show by a detective employed by the district attorney to serve subpoenas upon three of the aldermen alleged to have been bribed, whom the district attorney claimed were material and competent witnesses, that the detective was unable to find them in this State, but did find one of them in Canada and learned that the others were in Canada although he did not see them.

These persons were named in the indictment as co-defendants and the evidence already intended to show that some of them and especially one were intermediaries between the persons offending against the statutes relating to bribery, or instruments of whomever committed the act charged. This evidence was admitted under objection by defendant's counsel. It was not claimed that defendant was privy to the absence of the co-defendants, or that the object of the proof was to furnish a basis for evidence otherwise inadmissible, but the district attorney disclaimed any intention of proving the flight of these persons as co-conspirators, and so make use of their absence as evidence of guilt, or an admission by their conduct that the accusation against them and defendant was true, but said he offered it only to show that after diligent effort he was unable to procure their attendance as witnesses and thus enable him to account for their absence.

Held, That evidence of their absence was inadmissible, that it could have no legitimate bearing upon the issue.

The rule that when a party to an issue on trial has proof which if true would render material but doubtful fact certain, the law presumes against him if he omits to produce it, and authorizes a jury to resolve all doubts adversely to his defense, cannot be applied unless it appears that the proof, whether it is a living witness or a paper, is within his power.

Also held, That being irrelevant it should have been excluded, as it could do the prosecution no legal good and must subject the defendant to the prejudices and unfavorable inferences suggested by the absence of a co-defendant whose presence if innocent could not but assist the defendant, but whose absence and refusal to obey a subpoena might easily be regarded as a confession of guilt, and could not fail to strengthen in an appreciable degree the case of the prosecution.

Pease v. Smith, 61 N. Y., 477, distinguished and limited.

The legal principle which requires relevant and material evidence and admits no other is important, and however serious the charge against an accused person may be and great the evil it uncovers, it cannot properly be made the subject of a judicial sentence unless the crime is substantiated according to the established rules of evidence.

Judgment of General Term, affirming judgment of conviction, reversed.

Opinions by *Danforth* and *Peckham*, JJ. All concur.

WILLS. LEGACY.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Alexander Van Rensselaer, *exr.*, *respt.*, v. Annie W. Van Rensselaer et al., *appls.*

Decided Oct. 26, 1887.

The will of testator gave to plaintiff's testatrix a legacy "to be paid * * * out

of moneys derived from the sale" of a specified farm "or otherwise if it shall seem best to them," the executors. *Held*, That the discretion was as to payment from other assets, and if such discretion was not exercised the legacy should be paid from the avails of the farm.

Appeal from judgment of Special Term in favor of plaintiff.

Action to recover the amount of a legacy. One V. died in 1873, leaving a will by which he gave a legacy to plaintiff's testatrix as follows. "I hereby give and bequeath to my sister Elizabeth the sum of ten thousand dollars to be paid by my executors when it shall be convenient for them, without regard to the time fixed by law, out of the moneys derived from the sale of the Van Schaick farm left me by my brother C., or otherwise, if it shall seem best to them. It is further my will that this legacy shall be deemed subservient to all others."

The personal estate was largely in excess of the debts and of legacies, all of which were paid. The executor turned the balance over to defendant Annie who was the widow. Prior to the death of testator he had arranged with S. and A. by which they were to sell the farm named in the provision for legacy and after paying him \$20,000 were to be joint owners with him in one half the farm. Sales were made and mortgages thereon of over \$8,000 were among his assets, and subsequently other sales were made amounting to over \$15,000, which the executor at once gave the widow, as residuary legatee. Plaintiff's testatrix was the wife of a rich man.

Whether the widow was needy or pressed for money does not appear. The legacy to plaintiff's testatrix was not paid and this action was brought against the widow and the executor to recover it.

Thos. Allison, for appls.

J. E. Ackley, for resp't.

Held, That plaintiff was entitled to recover. His testatrix was the wife of a rich man and it seems to have been supposed that she could wait until further sales would furnish the means to pay her legacy. The defendant executor seems also to have a theory in relation to the farm, which was that "he felt no obligation" to pay Mrs. G., plaintiff's testatrix, until the \$20,000 and interest that was provided for in the S. and A. contract was paid to the widow; that Mrs. G. had no right to any part of that sum and that he so told the widow. It was partly from that reason and partly from the discretion vested in him by the form of the bequest that he paid over the money to the widow. The bequest, however, expressly directs the payment of the legacy "out of the money received from the sale of the farm" and the discretion was as to the payment of it from other assets, and this discretion was no doubt given to provide against the failure of the farm to pay the legacy. The direction to pay it out of the moneys received from the farm indicates a settled purpose that such moneys should be thus used. The bequest was made subservient, it is true, for the reason that it was to be

paid out of the proceeds of the land unless the executors thought it wise or proper in their discretion to pay it out of other moneys. If the discretion was not thus exercised, however, then it was to be paid out of the moneys received from the farm. There was at the time of testator's death a fund of over \$8,000 in mortgages and this was one composed of moneys received from sales of the farm lands and should have been appropriated to the payment of Mrs. G.'s legacy; but although no doubt whatever is entertained about this proposition, if it be an erroneous view, then the moneys subsequently received should have been so applied. The legacy was a charge upon the land, the proceeds from the sales of which were specifically appropriated to its payment. The defendant executor was led by an erroneous view of his duties. His sympathies were apparently with the widow of testator, and perhaps justly so on account of the supposed wealth of Mrs. G.'s husband, but this does not justify a departure from obligations plainly expressed. The errors committed are really those of the defendant executor in paying the sums of money received from the sales of part of the Van Schaick farm to the widow, and for these errors he was properly required to make reparation by the judgment pronounced against him.

Judgment affirmed, with costs.

Opinion by *Brady, J.*; *Van Brunt, P.J.*, and *Daniels, J.*, concur.

LEASE. CHATTEL MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Lewis M. Smith, *applt.*, v. Chas. F. Taber,, *respt.*

Decided Nov., 1887.

A farm lease provided that all the personal property and crops raised and to be raised on the land should be bound to the landlord as security, and that the landlord shall have the title to the property raised or produced or kept on the farm and right of possession at any time. The lease was properly filed as a chattel mortgage. *Held*, That the instrument was valid so as to create a lien as against a purchaser of crops raised on the farm without actual notice of said lien.

Appeal from judgment of nonsuit.

Action to recover the value of certain buckwheat purchased and taken by defendant. Plaintiff leased a farm to one C. by a written lease, which contained provisions giving him a lien on "all the personal property on said land or thereafter brought on" it and "all the personal property and crops raised and to be raised on said land * * * shall be bound to said Smith as collateral security." It further declared that for the purpose of securing him the lessor "shall have the title to all the personal property of whatever kind raised, made, produced, kept, put or used upon said farm, and he shall have the right of possession thereof at any time, and such title and right of possession is vested in said Smith as collateral security for the faithful performance of all the covenants."

The lease was duly filed in the clerk's office, and thereafter the buckwheat was purchased by defendant of the tenant without actual notice of the provisions of the lease. The buckwheat in question had been raised on the farm.

James A. Douglass and Alex. Cuming, for *applt.*

S. C. Taber, for *respt.*

Held, That the contract was valid, whether viewed exclusively as a chattel mortgage or as a "lien clause," to enable plaintiff to enforce payment of the rent out of any property of the tenant in and upon the premises. 103 N. Y., 122; 65 *id.*, 459. The language is apt and broad enough to create a present lien as well as a present transfer of title to all property mentioned. It is more full than the language of the agreement found in *Hale v. Omaha Nat. Bk.*, 49 N. Y., 634, which only provided for further and future liens being given.

Cressy v. Sabre, 17 Hun, 123, distinguished.

Treating the filing of the lease containing the lien clause and the security clause vesting the title to the property in the lessor as equivalent to an actual notice to defendant then it must follow that defendant is not a purchaser in good faith without notice; and hence he only acquired such rights as were possessed by his vendor as between the vendor and the lessor. 4 Abb. App. Cas., 302.

Duffus v. Bangs, 43 Hun, 54; *Johnson v. Crowfoot*, 53 Barb., 576, distinguished.

The property in question had a potential existence, and hence the transfer was not invalid. 34 Barb., 12.

Here it was stipulated that the title to the property should vest in the lessor, and as soon as it came into existence Smith had the right to it, as it was vested in him to the extent that was needed to secure or pay his debt, and that stipulation was valid. 32 N. Y., 417; 27 Hun, 91; 41 Barb., 404; Jones on mortgages, 115, §§ 141, 143; 7 How., 251; Harmon Chat. Mortg., § 44; 45 Hun, 318; *id.*, 302.

It is suggested by respondent that the mortgage was void because there was a contemporaneous agreement that the mortgagor might sell portions of the property. No such agreement is found in the instrument as in Reynolds v. Ellis, 103 N. Y., 122, and the trial court could not hold as matter of law that the instrument was void. If defendant shall give sufficient evidence to bring his case within the principle, the question may be one that should be submitted to a jury. So too, if the mortgage of plaintiff is inquired into a question of fact may be presented in regard thereto. 19 N. Y., 123. The sufficiency of the demand need not be passed upon as that was not the ground of the nonsuit.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by *Hardin, P.J.*; *Martin, J.*, concurs; *Follett, J.*, dissents.

FIRE INSURANCE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Sidney B. Roby, *respt.*, v. The American Central Ins. Co., of St. Louis, *applt.*

Decided Oct., 1887.

A mere dissolution of a copartnership prior to a loss by fire, but without any actual transfer of the interest of the retiring partner to the other until after the fire occurred, is not equivalent to a change or transfer of the title to the property insured, or any interest therein, within the meaning of a policy of insurance. Besides, a transfer by one member of a firm to another is not such an alienation of title or transfer by interest in the property insured.

The carrying on of business in a corporate name by the individual insured is no defense to the insurer.

An opinion expressed in the proofs of loss as to the origin of the fire does not preclude the insured from showing the contrary.

The question, whether the fact of alterations and additions being made in and about machinery and the employment of workmen in the building increases the risk of fire, is not a matter of expert testimony.

An expert who never saw the exhaust fan in operation, but merely examined it after the fire, cannot testify as to whether it increased the risk of fire.

Appeal from judgment entered upon verdict, and from order denying new trial.

On Jan. 26, 1882, defendant insured Wm. Cornis & Co. against loss by fire, for one year, upon their machinery, belting, fixtures, etc., contained in their building. On Jan. 28, 1883, the property was partially destroyed by fire. In Sept., 1882, the firm name was changed to the Rochester Wheel

Co., when an inventory of the property was taken, and the business thereafter was treated in most respects as belonging to plaintiff, but no notice of dissolution was published until Jan., 1883, and in March following plaintiff and Cornis settled, the latter assigning all his interest in the business and property to the former, and taking his note for the price.

A. J. Abbott, for applt.

W. N. Cogswell, for respt.

Held, That there was no transfer or change of the title to the property insured, or any part thereof, or any interest therein, within the meaning of the policy, during its continuance and prior to the time of the loss. It was not until the settlement in March, 1883, that a change of title was effected. 6 Cow., 441.

Besides, a transfer by one member of a firm to another is not such an alienation of title or transfer of interest as avoids the policy. 32 N. Y., 405.

The fact that plaintiff assumed the name of the Rochester Wheel Co. is no defense. 72 N. Y., 196.

Held further, That the proofs of loss were sufficient.

After the fire the general agent of the company acquired knowledge of the changes, etc., in the building, and his knowledge and acts were those of the company. 68 N. Y., 434; 81 id., 273.

Titus v. Glens Falls Ins. Co., 81 N. Y., 410, 419, sustains the trial justice in his charge on the subject of forfeiture and waiver.

It was insisted that the alterations and additions caused the loss

complained of. Plaintiff, in his proofs of loss, expressed the opinion that the fire originated through friction in the exhaust fan, which was put into the building after the insurance without defendant's consent.

Held, That while the statement in the affidavit was evidence on the question as to how the fire originated, still it was not conclusive thereon; it amounted to nothing more than an opinion; the question was still one of fact for the jury. 35 Hun, 75. No claim was made that plaintiff possessed actual knowledge upon the subject.

Evidence was given that the putting in of the exhaust fan did not increase the risk, but in fact diminished it. It was not shown to be improperly constructed or taken care of. The policy allowed suitable new machinery to be put in. An expert witness was asked: "While alterations, additions and changes are going on upon and around the property, in the place where it is located, by carpenters and other workmen, what do you say, as a matter of fact, whether, during the progress of that work, the risk to the property is increased, or otherwise?" Excluded. "Q. Would the working of such an exhaust fan at a high rate of speed, for the purpose and object for which it was put in there, in your opinion, increase the risk of fire?" The witness had never seen it in operation, but examined it after the fire. Excluded.

Held, Properly excluded. A person skilled in the construction

of such machinery may be allowed to express an opinion as to its effect in response to hypothetical questions; but the question put to the witness placed him in the position of the jury, and was therefore inadmissible. 7 Wend., 72; 97 N. Y., 507.

Judgment and order affirmed.

Opinion by *Corlett, J.*; *Haight* and *Bradley, JJ.*, concur.

NEGOTIABLE PAPER. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

William Barry et al., respts., v. Benjamin Lewis, applt.

Decided Oct. 26, 1887.

Where a complaint on a promissory note does not allege a valuable consideration, an admission by defendant's counsel of the making and delivery of the note "and all except the ownership," will not preclude defendant from showing that the note never had a valid inception because not supported by any consideration.

Appeal from judgment for plaintiffs and from order denying motion for a new trial.

Action on a promissory note made by defendant whereby he promised to pay \$500 apiece to plaintiffs. The complaint contained no allegation that the note was made and delivered for a valuable consideration. The answer set up no consideration; that it was understood that defendant was not to pay it; that plaintiffs and defendant were copartners; that plaintiffs were indebted to defendant to an amount much greater than the note, and that

plaintiffs were not the owners and holders of the note.

At the commencement of the trial defendant's counsel admitted everything—the making and delivery of the note and all except the ownership.

The court refused to allow defendant to show that there was no consideration for the note.

H. C. Place, for applt.

Geo. W. Delano, for respts.

Held, Error. That the admission evidently referred to the allegations of the complaint and was an admission of every allegation therein contained except that of ownership. It is to be observed that the complaint contains no allegation that the note was made and delivered for a valuable consideration, and therefore the admission, broad as it was, did not preclude defendant from showing that the note, although made and delivered by him, never had any legal inception because it was not supported by any consideration.

Judgment reversed and new trial granted, costs to appellant to abide event.

Opinion by *Van Brunt, P.J.*; *Daniels* and *Bartlett, JJ.*, concur.

APPEAL. NOTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

James Dorsey, respt., v. Rosella E. Pike, applt.

Decided Oct., 1887.

The twenty days after entry of a judgment rendered in the Municipal Court of Rochester expired on Sunday. *Held*, That notice of appeal served on the following Monday was timely.

Appeal from County Court order denying appellant's motion for order dismissing respondent's appeal from a judgment rendered in the Municipal Court of the city of Rochester. The motion was made on the sole ground that the appeal was not taken within twenty days after the entry of the judgment, as required by § 3046, Code Civ. Pro., which provides that such appeal "must be taken within twenty days after the entry of the judgment in the justice's docket." This judgment was rendered Nov. 22, 1886, and the twenty days after the entry of the judgment would expire on Dec. 12, 1886, which day was Sunday. The notice of appeal was served on Monday, Dec. 13.

William M. Bates, for applt.

Henry J. Sullivan, for resp't.

Held, That without the aid of the provision of § 788 of the Code, the notice of appeal was clearly served too late. 7 Cow., 147; 75 N. Y., 24.

The provision of § 788 is applicable to this case and the notice was served in due time. Courts not of record are included within provisions of §§ 787 and 788 of the Code, and we think the rule of computation applies to acts to be done in actions or proceedings originating in the Municipal Court of the City of Rochester. 93 N. Y., 93.

Marvin v. Marvin, 75 N. Y., 242, distinguished.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Barker, J.*; *Smith, P.J.*, *Haight* and *Bradley, JJ.*, concur.

WILLS. POWER OF SALE.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Gideon L. Knapp et al., respts., v. Maria M. Knapp, exrx., et al., impl'd., applts.

Decided Oct. 26, 1887.

Where a will provided that the executors might from time to time make actual partition of any property which testator held in common with others, and also that in their discretion they might, for the purpose of partition or the purposes of the will, sell any of the property at public or private sale, *Held*, That a sale could be made for the purpose of a partition during the life of the life tenant, his widow, especially where she had joined in the contract to sell.

One K. died leaving a will by which he devised certain real estate to his four sons, of whom defendant's testator was one. Testator subsequently died leaving a will by which he devised the residue of his estate to his widow for life with remainder to his children, gave his executors authority from time to time to make actual partition of any property owned by him in common with others, and by the fifth clause authorized his executors in their discretion, for the purpose of paying debts or making partition, or for any of the purposes of the will, to sell any of his real estate.

An agreement was entered into to make actual partition of all the property except one piece; defendant as executrix offered to join in a sale of said piece for the purpose of partition, but her right to do so was denied. This action was then brought for partition and defendant set up said offer. The court

held that the power to make partition was valid, but that the power of sale could not be exercised, as until the termination of the life estate no partition of testator's property could be had. Judgment was rendered for a partition according to the agreement and for a sale of the other piece by a referee in the action.

J. A. Burr, Jr., for applt.

S. H. Coombs, for respts.

Held, That the court erred in his construction of the fifth clause. It will have been observed that the authority to make partition from time to time was absolute; and if for that purpose in the exercise of her discretion the executrix thought it proper to sell any portion of the estate the power was conferred. It might well be that one distinct parcel of property might not be susceptible of partition, and might complicate any attempt at a partition of the whole estate, and therefore become very properly the subject of a distinct independent sale in the exercise of a wise discretion, and which should be assumed to exist unless the contrary appears, which is not the case here. It is true, as said by the learned judge in the court below, that the extent of the power depends upon the instrument creating it, and no intention is entertained of invading this principle, the power itself being regarded as sufficiently comprehensive to authorize a sale. The intention of testator, which is the guiding rule of interpretation, to invest his executors or the survivor of them with absolute discretionary power

to sell is manifest. Nothing can be much more sweeping than the phrase "for any of the purposes of this will," which includes every possible phase in which such an instrument can be considered.

But independently of that view it appears that the executrix, who is the survivor of the power, is willing to unite not only in the partition but in the sale both individually and as executrix, and indeed appeals with others from the judgment rendered below on the question of the power of sale, and thus all possible objection is removed which might be urged against the legality of the proceeding. See 1 Harris, Pa., 533.

Per DANIELS, J.—That the sale is necessary to complete the partition by the division of the proceeds among the owners of the lot; that as the partition was authorized by the will it seems to follow that the sale itself was equally authorized; that as the life tenant is the executrix and herself consented to the sale no other person can be at liberty to object to it; that the deed should recite the fact of the sale being made to complete partition, that the lot is incapable of being otherwise divided and that the sale is made for the purposes of the will, and under such a deed a clear title will be conveyed.

Judgment reversed in the respects named and decree entered that a proper execution of the power can be accomplished by the transfer by the widow individually and as executrix.

Opinions by *Brady* and *Daniels, JJ.*; *Van Brunt, P.J.*, concurs.

MANDAMUS. FISHERY.

N. Y. SUPREME COURT. GENERAL
TERM. SECOND DEPT.

John H. Abrams, *applt.*, v.
The Board of Town Auditors of
Hempstead, *respt.*

Decided July, 1887.

A mandamus cannot be made to do a prohibitory or reviewing duty.

The prohibition in Chap. 639, Laws of 1871, against granting a license for grounds already planted means land legally planted.

Where it appears that the applicant for a license had a former license for one year, but continued to occupy for several years without paying or intending to pay a license fee, the board is justified in refusing his application, but may grant a license to another he being a trespasser.

Appeal from order denying application for a mandamus.

Some three years ago plaintiff had a license for the lands in question for one year, but has since continued in possession without paying the license fee and without intending to take out a license. The board refused to grant him a new license on his application; he now claims that as he has had a license the board would have no right to license the ground to any one else.

Held, That the application for a mandamus was properly denied. The board has not refused to exercise its functions; on the contrary, it has acted upon the matter at appellant's request. The decision did not suit appellant and he is now seeking to compel the board by mandamus to decide in a dif-

ferent way. It is virtually an attempt to review the determination of a subordinate tribunal by the writ of mandamus. A mandamus cannot properly be made to do either a prohibitory or reviewing duty; its purpose is purely mandatory. 16 Hun, 219; 76 N. Y., 326.

That aside from any technical question the board was right on the merits. Chap. 639, Laws of 1871, regulates the leasing of the oyster grounds in Hempstead and Jamaica Bays. It confers on the board of audit of the respective towns the right and duty of licensing the grounds to inhabitants of the town, but allows but three acres to each inhabitant. It must appear to the satisfaction of the board when an application is made that the ground contains no planted bed of oysters or contains no bed planted by any person other than the applicant. Chap. 407, Laws of 1879, forbids the planting of oysters in those bays without license and makes it a misdemeanor for any one to plant oysters without a license.

That plaintiff's claim cannot be sound, because in that case no person would ever take out but one license. The town would be remediless for he could plant oysters and use the ground *ad libitum*. The prohibition in the statute against granting a license for grounds already planted means land legally planted. The town cannot be deprived of the right to license by a trespasser planting oysters. To hold otherwise would render the law nugatory.

That this was not a case of a party planting by mistake or in good faith intending to apply for a license, and, therefore, the board was justified in refusing a license to relator. In no other way can effect be given to the statute except to hold that the board may license any ground for which no license has been granted or applied for unless it is already legally planted.

Order affirmed, with costs.

Opinion by *Pratt, J.; Barnard, P.J., and Dykman, J., concur.*

JUSTICE'S COURT. EXECUTION. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Isaac Hampton, *applt.*, v. Clark I. Boylan et al., *respts.*

Decided Oct., 1887.

Where a justice of the peace removes from the county and deposits his docket book, etc., together with his certificate with the town clerk, as prescribed by the Code, an execution issued by him is properly returned to the town clerk.

Where a justice issued a body execution through mistake, and plaintiff's attorney directed the constable to disregard it, as it was void, the constable is not liable to plaintiff for disobeying the command of the execution.

An attorney employed to prosecute an action in a Justice's Court is competent, in an action against the constable for breach of duty, to testify to the fact of his employment and that he was authorized to attend to the execution, and that he instructed the constable that it was void.

Appeal from judgment entered upon verdict, and from order denying motion for a new trial.

Action against a constable and

his sureties for failure to return an execution issued upon a judgment of a justice of the peace within the time prescribed by law. Before the return day of the execution the justice filed his docket with the town clerk, together with the certificate required by the Code, and removed from the county. Defendant gave evidence tending to show that after the delivery of the execution to him he attempted to collect the execution out of the personal property of the judgment debtor, but that none could be found, and that within sixty-five days from such delivery he duly made his return upon the execution and filed the same with the town clerk. The court charged the jury that if they should find from the evidence that the constable returned the execution to the town clerk within sixty-five days after its issuance to him, such return would be a substantial compliance with the law, and consequently would relieve defendants from liability. Exception taken. The question was, whether the removal of the justice from the county and the surrender of his office as justice, relieves the constable from making return to him.

J. M. McNain, for *applt.*

W. C. Windsor, for *respts.*

Held, That the execution was properly returned to and filed with the town clerk, the justice having removed from the county and filed his docket and certificate with the town clerk.

Section 3039, Code Civ. Pro., gives a right of action against the constable for failure to return an

execution within five days after the return day thereof. Section 3042 provides that his sureties shall be liable for any neglect of duty with respect to the execution. If the justice absconds, or removes to parts unknown, or dies; a return to the justice could not be made under § 3031; and we can hardly believe that, under such circumstances, it was the intention of the legislature to hold the constable and his sureties responsible for the amount of the execution. Was it the duty of the constable to follow up the justice into the county to which he had removed, and there make his return to him? By removing from the county he had abandoned his office, he had surrendered up his docket, and was no longer authorized to act as magistrate. If the constable could be required to follow him into one county, he could into another, even the remotest county in the State; and if so, why not into other States? This would impose hardships upon constables that would be unjust and inequitable, and such a construction ought not to prevail unless required by the express provisions of the Code. §§ 3144 and 3145. Though § 3146 does not in express terms provide that the execution shall be returned to and filed with the town clerk, still it appears to us to authorize such filing, the justice's office having become vacant by his removal from the county. The town clerk thereby became entitled to demand and receive all books and papers which belonged to the justice in his official capacity. The

execution belonged to the justice in his official capacity, and was one of the papers which the town clerk had the right to demand and receive from the person having possession of it. There is no conflict between §§ 3031 and 3146.

Where the justice issued a body execution through mistake, and plaintiff's attorney instructed the constable not to take the defendant's body as directed by the execution, as it was void,

Held, That the constable was not liable to the plaintiff for disobeying the command of the execution.

Held further, That it is competent for an attorney to testify that he was employed by plaintiff to appear on his behalf in Justice's Court and to attend to the execution issued to the constable, and that he directed him not to arrest the defendant thereunder.

Judgment and order affirmed.

Opinion by *Haight, J.*; *Smith, P.J.*, *Barker* and *Bradley, J.J.*, concur.

FORFEITED RECOGNIZANCE. JUDGMENT.

N. Y. COMMON PLEAS. GENERAL TERM.

The People v. J. H. Boessemeeker et al.

Decided Dec. 5, 1887.

A judgment entered against surety and principal respectively, on a forfeited recognizance will be cancelled on motion, where it appears that subsequent to the forfeiture the accused person appeared, was tried, and paid the fine imposed.

Application to vacate and cancel

of record a judgment against defendant Boessemeecker and Cooney, as surety and principal respectively, entered upon a forfeited recognizance.

It appeared not only that the accused person subsequently appeared for trial, but that he was actually tried and convicted of the offense charged. He was sentenced to pay a fine and such fine has been paid.

R. B. Martine, Dist. Att'y., opposed.

John O'Byrne, for motion.

Held, That under the authorities and the rules heretofore adopted by this court, the bail is entitled to have the judgment against him discharged, and this application should be granted. 5 Daly, 527; *id.*, 553; 6 *id.*, 120; *id.*, 493.

Opinion by *Larremore*, Ch. J.; *Daly* and *Van Hoesen*, JJ., concur.

DRAINS. EASEMENT.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Lewis Munsion, respt., v. John Reid, applt.

Decided Nov., 1887.

A grantor owned five lots. Four of these adjoined each other on one street while the fifth lot on another street was directly in the rear of the fourth or most easterly lot. He built a drain running through the rear of each of the four lots and then through the fifth lot to the street in the rear. He first conveyed the third lot (counting from the next) to defendant but reserving to himself no right in the drain. Afterward he conveyed the first or most westerly lot to plaintiffs grantors without mention of the drain.

Defendant obstructed the drain. *Held*, That plaintiff had no right of action as the drain was entirely underground.

Uses in such case begins to run only from the time of actual notice to a person other than the grantor who was the common source of title.

Appeal from judgment for plaintiff. In 1845 Platt Williams owned four lots on Clinton avenue and one on Orange street in Albany. Clinton avenue and Orange street are parallel and run east and west, Orange street being south of Clinton avenue and distant from it about 200 feet. The four lots adjoined each other and ran half way through the block; the fifth lot was on Orange street of the same depth and directly in the rear of the fourth or most easterly lot on Clinton avenue. Williams built a drain which was entirely underground and ran easterly from about the center of the first or most westerly lot on Clinton avenue across the rear part of each of the other lots on Clinton avenue; when it reached the most easterly one it turned at right angles and ran south through the center of that lot and the center of the lot on Orange street in the rear and so emptied into Orange street. Plaintiff now owns the first of these lots and defendant the third. Williams conveyed defendant's lot in 1845 to one Davidson. This deed was not recorded until 1873. It says "the said party of the second part is to have the use of the drain in the rear of said premises leading from thence through another lot of the parties of the first part to the public drain in Orange street, but

the said party of the second part is hereafter to contribute proportionately to the expense of keeping the drain in repair." Defendant's deed referred to this provision about the drain. Williams in 1849 conveyed plaintiff's lot to one Vail. This deed did not refer to the drain but contains the expression "together with all and singular the hereditaments and appurtenances." Vail conveyed to Rennie the lot and "the free and uninterrupted use of the drain." After several other conveyances it came to plaintiff by a deed dated in 1860 recorded in 1871 and it contained the last above clause as to the drain. In 1885 defendant cut off the drain and this action was brought.

Isaac Lawson, for applt.

G. L. Stedman, for respt.

Held, That the verdict directed for plaintiff was erroneous. This drain was entirely underground and the rules which apply to a visible water course have no application. 46 N. Y., 394. The grantee in such case takes his land according to the terms of his deed and if the deed gives no notice of any right in favor of the lot retained by the grantor upon or across the lot conveyed the latter lot is freed from the servitude. And see 13 Jones & S., 555. The first deed of defendant's lot, the one to Davidson, gives no notice that defendant's lot is burdened with a servitude in favor of the grantor's lots to the next, but it is stated that the lot conveyed is benefitted by a servitude to have the use of the drain over

the lot to the east and so to Orange street. Plaintiff acquired no right by priority of record. Defendants lot has been actually occupied by Williams' grantees since 1845 and plaintiff was put on inquiry. The evidence does not establish sufficient adverse uses to ripen into a title. Such uses would be non-apparent and would not begin to run until notice was brought to some grantee of Williams. 82 N. Y., 265; 100 id., 455; 19 Wend. 309; 100 Mass., 297. There is no evidence of notice to any one before 1874.

Judgment reversed.

Opinion by *Landon, J.*; *Learned, P.J.*, and *Williams, J.*, concur.

MUTUAL INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Herbert S. Fulmer et al., respts., v. The Union Mutual Association, applt.

Decided Nov., 1887.

Where a certificate of mutual insurance contains an absolute promise to pay a certain sum on the death of the member, proof of the death, that proper proofs were served, failure to pay and that the last assessment produced more than enough to pay the claim, is sufficient to a breach of the contract and that the beneficiaries are entitled to the sum named.

Appeal from judgment in favor of plaintiffs entered on report of a referee.

Action on two policies issued by defendant on the life of F., plaintiffs' father, in 1885. F. died in June, 1886, and proofs of death

were duly delivered to and received by defendant.

Defendant is incorporated under the laws of Michigan and is engaged in insuring lives of its members on the co-operative or assessment plan.

The complaint set forth the certificates of insurance, each containing words of promise to pay, substantially that defendant "agrees to pay to the sons * * * share and share alike two thousand dollars." It alleges the proof of death, lapse of time, failure to pay, and that the amount became due Oct., 1886; that defendant promised to pay and its failure to pay. Defendant admitted its incorporation.

It appeared that defendant's secretary was negotiating a settlement of plaintiffs' claims, and on Oct. 19, 1886, wrote a letter to one of them stating "I will see you early next week and then and there expect to render you full satisfaction as to your claim;" that on Jan. 19, 1887, defendant by its board of directors adopted a resolution declining to pay, basing its refusal on circumstances surrounding the making of the application and not on any failure to pay any assessment or any defect in the proof or any want of ability to pay the loss or to realize sufficient funds from an assessment for that purpose; that the secretary gave notice of such resolution, and that in the negotiations he stated that the "last assessment brought in about \$9,000."

Defendant gave no evidence of any defense. The referee found

as conclusion of law that defendant was liable for the amount stated in the policies.

Defendant now claims that plaintiffs have not shown a breach of defendant's contract, and if so, that the damages are only nominal and not the amount of the certificates, and also that error was committed in receiving evidence.

Ames, Platt & Wilson and Floyd R. Mechem, for applt.

Homer Weston, for respts.

Held, That the case is brought within the decision made in the Third Dept. in *Freeman v. The National Benefit Society*, 42 Hun, 252, and that we should follow that decision, and we therefore sustain the judgment of the referee. See also 2 Abb. Nat. Dig., 78, § 131.

Judgment affirmed, with costs.

Opinion by *Hardin, P.J.*; *Follett* and *Martin, JJ.*, concur.

AUCTIONEER'S BOND. N. Y. CITY.

N. Y. COMMON PLEAS. GENERAL TERM.

Manuel Viadero, applt., v. *William Stacom et al.*, *respts.*

Decided Dec. 5, 1887.

The sureties upon a bond given by an auctioneer in the city of New York, under the provisions of § 123 of the Consolidation Act, on applying to the mayor for a license, are not liable for breach of contract with, or of duty toward persons consigning goods for sale on the part of the auctioneer; and an action can be maintained upon such bond only by those who have been defrauded by false or fraudulent representations in the sale of goods by such auctioneer.

Appeal by plaintiff from judgment of General Term, City Court sustaining demurrer of defendant Stacom, and reversing order of Special Term overruling such demurrer.

Plaintiff entrusted goods of the value of \$100 to one M., a duly licensed auctioneer in the city of New York, to sell at public auction. M. sold a part of the goods and received for the same \$69, but never accounted to plaintiff for the same, nor for the goods unsold, but converted them to his own use and absconded to parts unknown. This action is brought upon the bond given by M. as auctioneer with the defendants Stacom and Michael M. as securities, to recover \$100 damages. The bond was dated and delivered Sept. 25, 1883, and made to the mayor, aldermen and commonalty of the city of New York, in the penal sum of \$2,000, and recites that M. has applied to said mayor for a license to carry on the business of an auctioneer, and that the mayor has required the filing of this bond, pursuant to statute. The condition of the bond is that M., his copartners, clerks, agents and servants, shall well and truly carry on his said business of auctioneer, and in all things obey and conform to all laws of the State of New York, and all ordinances and resolutions of the common council of the city of New York, now in force or hereafter to be enacted or adopted, relating especially to the business of auctioneer in the city of New York; and shall refrain from all fraudulent, deceitful and

dishonest practices, and especially from those mentioned in the act of the legislature of the State of New York passed April 9, 1853, entitled "An act to punish gross frauds and to suppress mock auctions."

The defendant Stacom demurred to the complaint: 1. For non-joinder of M., his principal, as defendant. 2. That the complaint does not state facts sufficient to constitute a cause of action against said defendant.

H. E. Farnsworth, for applt.

Langbein Bro's., for respts.

Held, That the bond in question was given in pursuance of the provisions of the Consolidation Act of 1882. The object of the bond, as plainly appears from the several provisions of the act is to furnish indemnity to those persons who are defrauded by the auctioneer in the cases specified in said act; viz.: in §§ 1992, 1993, 1994.

These express provisions of law as to when, in what manner, and in what cases the bond is to be forfeited, exclude all other cases, and limit the objects of the bond to those specified.

Plaintiff was not defrauded by any of the practices specified in the statute. He is a contract creditor of the auctioneer as to his demand for the proceeds of that portion of the goods which have been sold, and has a claim for damages for that portion of the goods converted. The frauds enumerated in the statute are those practised upon purchasers at auction sales. Breach of contract with, or of duty toward persons consigning

goods for sale on the part of the auctioneer, is not embraced among the causes for which the auctioneer's bond may be forfeited, and for which an action upon it may be, therefore, maintained.

Judgment affirmed.

Opinion by *Daly, J.*; *Van Hoesen, J.*, concurs in result.

INJUNCTION.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The Rome, Watertown & Ogdensburgh T. R. Co., *applt.*, v. The City of Rochester, *respt.*

Decided Oct., 1887.

Upon a motion for an injunction *pendente lite* the verified pleadings may be treated as affidavits, and effect given to them as affidavits only. And where all of the material allegations of the complaint are positive and direct, and made and verified upon the personal knowledge of the affiant, and the denials and averments of the answer are made only upon information and belief, the answer is insufficient, as an affidavit, to put in issue the facts alleged in the complaint.

Appeal from order denying motion for an injunction *pendente lite*.

The application resulting in the order appealed from was heard and determined upon the pleadings and certain proofs appearing in the printed papers on this appeal. All of the material allegations in the complaint are positive and direct, and are made and verified as within the personal knowledge of the affiant, and if accepted as true clearly present a case entitling the plaintiff to the relief sought on the motion. The alle-

gations of the answer, as to all material matters, are made upon information and belief only.

Morgan & French, for applt.

Ivan Powers, for respt.

Held, That the motion should have been granted. The complaint and answer were properly treated as affidavits upon the hearing of the motion, Code, § 630, and had the effect of affidavits only. 58 How., 250. It is, therefore, quite plain that the statements and allegations contained in the complaint, treating the same as an affidavit, were not controverted by defendant. The answer read by defendant in opposition to the motion was at most an affidavit by one of the defendants to the effect that he was informed and believed that the allegations in the complaint of plaintiff were untrue, and that as to such defendant he was informed and believed that certain other facts existed inconsistent with the statements of plaintiff, the existence of which would negative such statements made by plaintiff. Such an affidavit proves nothing and does not call upon or aid the court in determining any fact necessary to be determined in order to administer relief in any given case. See 65 N. Y., 584.

The answer is sufficient to present issues for trial in the action, but we think wholly insufficient as an affidavit to put in issue on this motion any of the material statements or allegations in plaintiff's (complaint) affidavit.

This view renders it unnecessary to examine the other questions presented and elaborately argued

on this appeal. It is, however, proper to observe that the threatened invasion of the claimed right of plaintiff is admitted by defendant, by whom the right to destroy the property of plaintiff is asserted; and it would appear that the magnitude of the interests involved in this contention would call upon the court by its order to protect the property of plaintiff until the rights of the parties are settled by the judgment of the court, after the parties have had the opportunity of presenting all pertinent matters for consideration.

Order reversed, and motion granted.

Opinion by *Childs, J.; Smith, P.J., and Bradley, J.*, concur.

RAILROADS. NEGLIGENCE.

N. Y. COURT OF APPEALS.

Bushby, respt., v. The N. Y., L. E. & W. RR. Co., applt.

Decided Nov. 29, 1887.

Plaintiff, who was an employee of defendant, was injured by the breaking of a stake on a car of lumber while in transit. The car was furnished by defendant without stakes, which were put in by the shipper. There were no rules as to inspection of such cars, but the station agent superintended the loading of the car. *Held*, That it was the duty of defendant to fit and prepare the car for the use to which it was put, and it was liable for an omission of that duty and for the negligence of the shipper.

Affirming S. C., 28 W. Dig., 458.

This was an action to recover damages for injuries received by plaintiff through the alleged negligence of defendant. It appeared that defendant, with knowledge

that it was to be used for the carriage of lumber over its tracks and by its servants, delivered to one L. a platform car, to the sills of which on each side six permanent loops or iron pockets were securely bolted, which were intended for the reception of stakes or standards, so that when thus equipped the car would be adapted for carrying a loose load, such as lumber or the like. No stakes were furnished with the car. L. had never before loaded a car. He placed a stake in each of four pockets on either side of the car, and piled on and arranged the lumber under the direction of defendant's station agent, who regulated the length of the stakes. The car was then added to a freight train on which plaintiff was employed as brakeman, and in the performance of his duty he was necessarily upon the car while the train was going around a curve at a high rate of speed. At that moment one of the stakes broke, and by reason thereof plaintiff, without fault on his part, was thrown with the lumber upon the track and severely injured. Upon examination it was found that the stake in question was made of very poor, partly decayed wood and broke off almost even with the top of the stake-hole. It did not appear that defendant had made any rules or directions as to the inspection of such cars, or that any agent of the company, except as above mentioned, superintended the putting in of the stakes. Defendant proved that it was its system to let the shipper load and stake, and its

evidence tended to show that if in the general performance of the duties of their employment the station agent found anything out of the way he should correct it, or if the conductor or brakeman saw a defect he should report it to the station master. No special duty was imposed on either in regard to inspection, nor direction given as to its manner. A motion for a nonsuit was granted.

E. C. Sprague, for applt.

A. Hadden, for respt.

Held, Error; that plaintiff was entitled to recover; that the duty was upon defendant as master to fit or prepare the car for the use to which it was consigned and it is liable for an omission to perform that duty, or for negligence or failure in any degree in respect to it. Defendant is equally responsible for the negligence of the shipper in fitting out the car for use; that the negligence was that of the master and the duty one that he could not so delegate as to relieve himself from liability.

The law imposes upon a railroad company the duty to its employees of diligence and care, not only in furnishing proper and safe appliances and machinery, and skillful and careful co-employees, but also of making and promulgating rules which, if faithfully observed, will give to its employees reasonable protection. 103 N. Y., 581.

Order of General Term, reversing judgment of nonsuit and granting a new trial, affirmed, and judgment absolute on stipulation for plaintiff.

Opinion by *Danforth, J.* All concur.

BILL OF PARTICULARS.

N. Y. SUPERIOR COURT. GENERAL TERM.

Francis Lahey, applt., v. *Gouverneur Kortright et al.*, *respts.*

Decided Dec. 12, 1887.

In an action by the proposed purchaser of real property to recover the amount of the deposit made by him, and expenses of examining title, etc., on the ground that the seller could not give good title, a bill of particulars may be ordered of the specific defects claimed in the complaint to exist in the title.

Appeal from order requiring plaintiff to make his reply more definite and certain by specifying the particulars in which he claims defendants' title to be defective, and to serve a bill of particulars setting forth the specific defects claimed in the complaint to exist in defendants' title.

Action to procure the repayment to plaintiff of the ten per cent. deposited by him with the auctioneers, on sale by auction of certain real estate, and to recover expenses of examining title, on the ground that the vendors could not give a good title. The answer alleged a cause of action against plaintiff for a forfeiture of the ten per cent., alleging that the vendors have a good title. The reply to this cause of action repeated substantially the allegations of the complaint.

J. T. Malcolm and *S. Jones*, for applt.

Platt & Bowers, for respts.

Held, That the charge that defendants will be called to meet is that the title that they offered to convey was not a good title to the premises, and it is necessary to a fair trial of the action that defendants should be apprised beforehand of the specific defects in the title. Without such knowledge defendants may be surprised on the trial by the presentation of a defect which it is possible may be met or removed. If there is no substantial defect, plaintiff cannot be injured by being compelled to specify such defect. The order appealed from, however, in addition to requiring a bill of particulars, requires that plaintiff make his reply more definite and certain, or specify some particulars that he is required to furnish by the bill of particulars ordered. Both of these remedies are not required, and from the nature of the action, the more appropriate method is to require plaintiff to furnish the bill of particulars.

Order modified by striking out provision for service of amended reply, and as modified affirmed, without costs.

Opinion *per curiam*.

MUTUAL INSURANCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Thos. J. O'Brien, admr., *respt.*,
v. The Home Benefit Society of
N. Y., *applt.*

Decided Nov., 1887.

In an action at law to recover on a contract by a life insurance company, con-

ducted on the assessment plan, the agreement was to pay the beneficiary "all the amount realized from one assessment, not exceeding \$2,000." *Held*, That the burden was on the plaintiff to show what amount one assessment would produce, and that failing to make such proof he should have been nonsuited.

The action was against a life insurance assessment society. The contract was to pay the beneficiary "all the amount realized, not exceeding \$2,000." Plaintiff did not show what this amount was. A motion for a nonsuit was denied.

Charles Blandy, for *applt.*

E. J. Meegan and *E. Countryman*, for *respt.*

Held, Error. The burden was on plaintiff, this being an action at law, to show how much he was entitled to under the terms of the policy, and until that was shown he was entitled only to nominal damages. The amount realized might be more or less than \$2,000. In the absence of evidence there can be no presumption that it will equal \$2,000, for that is clearly the greatest sum, implying that it may be less. There is a provision in the contract that "assessments are only levied when the indemnity fund for the payment of death accidents is exhausted." There may be other money applicable to the payment of this claim. We do not think it was necessary for plaintiff to prove that the indemnity fund was not exhausted. That fund is under defendant's care and if it made no assessment it would be presumed that none was necessary. But plaintiff must show what one assessment would produce. This is not like the case of

Danon, in 42 Hun; there the agreement was to pay \$5,000 from the death fund of this society, and there was evidence tending to show that the death fund had or ought to have had the money. In the Freeman case, 42 Hun, 252, the agreement was to pay a sum equal to the amount received from the death assessment, not to exceed \$3,000, and there was evidence tending to show that the amount received from the death assessment would exceed \$3,000. In neither of these cases did the company make the payment dependent upon the special assessment to be levied for the particular payment.

Judgment reversed.

Opinion by *Landon, J.*; *Williams, J.*, concurs in result; *Learned, P.J.*, not acting.

LEASE.

N. Y. COURT OF APPEALS.

Pickett, *applt.*, v. Bartlett et al.,
respts.

Decided Nov. 29, 1887.

Certain premises were let for one year to defendants as a bonded warehouse, defendants covenanting to pay the rent for the term and also for such further time as they may hold the same. At the close of the term there were goods in the warehouse which could not be removed without the consent of the government, but when such consent was obtained it was locked and the keys left at a place directed by plaintiff. There was evidence of a surrender at the close of the term. *Held*, That the holding over was on the covenant only, and did not constitute a holding over so as to render defendants liable for rent a second year.

This was an action to recover rent. It appeared that on Nov. 1, 1880, plaintiff's assignor demised a bonded warehouse to defendants. Both parties executed the lease, which, after describing the property, provided that the term was for one year from Nov. 1, 1880, at a rental of \$6,500 per year, and the lessee agreed to pay the rent in quarterly payments and to quit and deliver up the premises at the end of said term "and to pay the rent for said term, and also for such further time as the party of the second part may hold the same." The complaint alleged that the year for which the premises were demised to defendants ended Nov. 1, 1881, but that they "continued in occupation and possession, and did not surrender or offer to surrender possession thereof, but held over," and the lessors elected to hold them as tenants for another year. Plaintiff claimed to recover rent alleged to be due for the last three-quarters of the second year. At the trial it appeared that bonded goods belonging to the defendant's customers and placed by them in the stores before Nov. 1, 1881, were left there until Dec. 23, 1881, in consequence of defendants' inability to remove them without the consent of the government officials, when the government locks were removed, the defendants' bond as warehousemen canceled, padlocks put on the doors and the keys left at an office where, in a certain contingency, plaintiff had directed them to be left. There was evidence by parol and other-

wise tending to show a surrender of the premises at the expiration of the term.

Charles Knox, for applt.

Wm. W. Goodrich, for respts.

Held, That by the express covenants of the lease it did not continue in force beyond the term of one year, specified in and created by it, and the holding over must be deemed to have been on the defendants' covenant solely; it therefore was not wrongful nor such a holding over as makes the tenant a wrongdoer, and enables the landlord at his option to treat him as a trespasser or hold him for the rent a second year.

Schuyler v. Smith, 51 N. Y., 309; *Western Transp. Co., v. Lansing*, 49 id., 499, distinguished.

Judgment of General Term, affirming judgment for defendants, affirmed.

Opinion by *Danforth, J.* All concur, except *Ruger, Ch. J.*, not voting.

ASSESSMENTS. PAYMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Hannah P. Vanderbeck, applt., v. The City of Rochester, respt.

Decided Oct., 1887.

Money voluntarily paid by a widow out of her own personal funds to discharge the lien of a valid assessment upon property in which she claims dower, no proceedings having been taken to collect the assessment, cannot be recovered back.

Lands were assessed for benefits supposed to be derived from opening a proposed boulevard. The assessments were collected and the moneys applied toward payment of the awards made for lands

taken, but nothing had been done toward opening or working the boulevard although six years had elapsed. Under the city charter it required a majority petition of the landowners, or a three-fourths vote of the council, in order to open and work a street; but no petition had ever been presented, and no action had been taken by the council. *Held*, That a person who had been assessed for benefits could not recover back his money upon the ground that the proceedings had been abandoned.

Chapter 311, Laws 1861, relative to opening and working highways within six years, etc., is not applicable to streets laid out within the cities of the State.

Appeal from judgment entered upon report of referee dismissing complaint.

Action to recover back moneys paid on an assessment for opening a street. One V. was awarded \$1,010 as compensation for his land taken by the city for the purpose of opening a boulevard, and after confirmation of the commissioners' report he was assessed \$1,415 for benefits. The whole amount of assessments made was not sufficient to pay the awards and the expenses. The assessment was payable in instalments on May 20, 1877, Feb. 20, 1878, Feb. 20, 1879. In March, 1878, V. died intestate, leaving him surviving his widow, the plaintiff, and children. In May, 1879, plaintiff was notified to pay the assessment, which then amounted to \$468, after deducting the award, and in July following she paid the same out of her personal funds, to protect her dower interest. No process had been issued for collection of the assessment. Plaintiff afterward demanded the money back, which defendant refused. Noth-

ing was ever done toward working or opening the boulevard. But defendant paid out all moneys collected on the assessment to the landowners in payment of these awards. The referee dismissed the complaint.

J. J. Luckey and J. A. Barhite, for applt.

Ivan Powers and H. J. Sullivan, for respt.

Held, That the payment made was voluntary, without any duress, and therefore could not be recovered back.

Until assignment of her dower plaintiff had no estate in the lands, but merely a right of action. Nothing had been done toward selling the land for the assessment. Her dower interest was not in peril if her husband left sufficient personal property to pay the assessment; and she failed to show that the assets were not sufficient. A widow is entitled to have her dower assigned clear of the arrears of taxes, etc., which are payable out of the husband's personal estate. 56 Barb., 251. About two years had elapsed since the assessment was made, and she was aware that nothing had been done to open and work the boulevard. She was not personally liable for the assessment, yet she paid it. The payment was voluntary and she cannot recover it back. Dill Munic. Corp., §§ 946-7.

Defendant's charter provides that "The Common Council shall not open or work any street or alley, or make or ordain any work or improvement, the expense whereof is to be defrayed in whole

or in part by local assessment, except upon the petition of a majority of the owners of property to be assessed therefor, unless three-fourths of all the members elected vote therefor, after allegations have been heard." In this case, only such sum as was necessary to lay out and pay for the land of the boulevard was assessed upon the property benefited. The money paid by appellant was appropriated for that purpose. The owners of the property neglected to petition the council to proceed with the improvement. Had they presented such a petition a majority of the council could have ordered the boulevard opened. If plaintiff could maintain this action and recover back the money paid by her, her property would receive the benefits of the improvement and escape paying for them, at least to the amount of the money recovered. The landowners must be held to have acquiesced in the propriety of the council's delay in opening the boulevard.

Bradford v. Chicago, 25 Ill., 411, explained and distinguished. In the case at bar the assessment was valid; the money collected was used in purchasing land for the boulevard and the expenses of the proceedings taken to lay it out. Since this action was commenced proceedings have been instituted to complete the improvement, and plaintiff's land will soon receive the benefits arising from the opening of the boulevard.

Held, further, That Chap. 311, Laws of 1861, relating to opening and working highways within six

years, etc., is not applicable to streets laid out within the cities of the State. 29 Hun, 305; 92 N. Y., 629.

Judgment and order affirmed.

Opinion by *Lewis, J.; Smith, P.J., Barker and Bradley, JJ*, concur.

WAGER. CONTRACTS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Henry C. Peck, *applt.*, v. Doran & Wright Co., Limited, *respt.*

Decided Nov., 1887.

The complaint alleged that the parties trafficked upon the market value of wheat; that orders were given and a margin paid defendant to secure him against a decline in the market value; that if that value advanced plaintiff was entitled to the advance; that the transactions were based on the fluctuations of the market value; that defendant had closed the transactions on the basis of the market and had retained the margin of \$2,535, which plaintiff sought to recover. On demurrer, *Held*, That the complaint stated a wagering contract, and the latter was void.

The complaint alleged that the parties agreed to deal and traffic upon the market value of wheat and that they did so deal and traffic; that plaintiff gave orders to defendant for wheat and paid defendant commissions for doing the business and also paid a margin to secure defendant against a decline in the market value; that if that value advanced plaintiff was entitled to the advance; that the transactions were based on the state, conditions and fluctuations of the market value and that defendant had closed the transactions on the

basis of the market and had retained the margin of \$2,535. Defendant demurred and the demurrer was sustained.

W. H. Shepard, for *applt.*

H. T. Sandford, for *respt.*

Held, That the complaint stated a wagering contract. 70 N. Y., 206. The allegation of the complaint is that the subject of dealing was the market value of wheat and not wheat itself. If the orders for wheat were to be actually fulfilled there would be no need for the agreement in the complaint that plaintiff was to be entitled to the advance in the market value. If there had been an actual purchase and a subsequent sale at a decline of \$2,535, then defendant would not have kept and retained that sum, but it would have been lost by the decline. Interlocutory judgment affirmed.

Opinion by *Learned, P.J.; Williams, J.*, concurs; *Landon, J.*, dissents.

PRACTICE. APPEAL.

N. Y. COURT OF APPEALS.

Pharis, *applt.*, v. Gere, *respt.*

Decided Oct. 18, 1887.

Where the General Term reverses an order denying motion for a new trial on the minutes and grants a new trial, it will be assumed that its order was based on one of the grounds mentioned in § 999, and where the case presents disputed questions of fact it cannot be said that the reversal was not on a question of fact, and an appeal from such order to the Court of Appeals brings up nothing to review.

See S. C., 21 W. Dig., 491.

This action was brought to recover damages for the forcible

entry and detainer by the defendant of certain salt blocks. Several questions of fact were litigated upon the trial and submitted to the jury and they rendered a verdict for the plaintiff. Defendant moved for a new trial upon the minutes of the trial judge and his motion was denied. Subsequently a judgment was entered on the verdict, and then defendant appealed from the order denying the motion for a new trial, and from the judgment to the General Term, where both the order and judgment were reversed and new trial granted. Plaintiff then appealed to this court, giving the usual stipulation, claiming that this case was not so before the General Term that it could reverse the order and judgment upon a question of fact.

Louis Marshall, for applt.

George F. Comstock, for respt.

Held, Untenable; that under § 999, Code Civil Procedure, it rested in the discretion of the trial judge whether to grant or deny the motion for a new trial; that written notice of such a motion is not necessary; that the General Term having reversed the order and granted a new trial it must be assumed that its order was based upon some one of the grounds mentioned in said section of the Code, and as the case presented disputed questions of fact, it cannot be said that the reversal was not upon a question of fact, and upon an appeal from such an order to this court as the reversal may have been upon a question of fact there is nothing to review,

Appeal dismissed.

Opinion by *Earl, J.* All concur, except *Ruger, Ch. J.*, not sitting.

PARTNERSHIP. NEGOTIABLE PAPER.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Conrad Sipfle, Jr., et al., *respts.*
v. Alfred H. Isham, impl'd,
applt.

Decided Nov., 1887:

Evidence insufficient to show a partnership. In an action on a note alleged to have been made by defendants as partners the partnership was not proved or found and it was not made to appear that the defendant answering gave the other authority to make a note to bind him. *Held*, That plaintiffs were not entitled to recover.

Appeal from judgment entered on report of referee.

Action on a promissory note. The complaint alleged that defendants were copartners and as such made their note as set forth and delivered it to plaintiffs. The cause of action for which the note was given was not set forth. Defendant alleged that he was not a partner, never made the note nor authorized it to be made by S., the other defendant, and that he was not liable on it.

It appeared that the note was made by S.; that in May, 1882, defendant had written two letters to S., in which he said, "I cannot go into any business until Jan. 1, 1883." And that S. ordered the goods for which the note was given in July, 1882.

The referee did not find that defendant and S. were partners nor that S. was authorized by defend-

ant to make the note, but held as matter of law that defendant was indebted to plaintiffs in the note and reported in favor of plaintiffs.

E. A. Nash, for applt.

Homer Weston, for respts.

Held, Error. That there was no partnership shown, nor did defendant hold himself out by acts as a partner so as to bind him as such copartner to third persons. 66 N. Y., 424.

Haas v. Roat, 26 Hun, 632, 15 id., 526, distinguished.

There was no proof given of any authority in S. to make a note in name and behalf of Isham. There being no copartnership found, the implied authority of one member of a firm to do what is necessary "to carry on the business of the partnership" cannot be used to sustain a recovery on the note.

Webster v. Hackett, 7 Hun, 229; *Tradesmen's Bk. v. Astor*, 16 Wend., 88; *Nat. Union Bk. v. Landon*, 66 Barb., 190, distinguished.

Plaintiffs planted themselves upon the averment that Isham was a partner. That was not proven; nor is it found by the referee. Nor is it made to appear that Isham ever gave any authority to S. to make a note to bind him, and, therefore, plaintiffs were not entitled to recover upon the pleadings, proofs and findings. 87 N. Y., 37. If plaintiffs wish to test the right of S. to contract the debt for and in behalf of Isham as his agent, and upon special authority, they should present proper allegations and proofs.

Judgment reversed and new

trial ordered before another referee, costs to abide event.

Opinion by *Hardin, P.J.*; *Follett* and *Martin, JJ.*, concur.

MURDER. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People, *respts.*, v. Frank Palmer, *applt.*

Decided Nov., 1887.

By § 181, Penal Code, as amended by Chap. 384, Laws of 1882, direct proof is required of the death of the person alleged to have been killed in an indictment for murder or manslaughter. In the case at bar the body had not been mutilated but was much wasted by decay. No person identified the body positively or by personal peculiarities. Evidence was given that some of the clothing, one boot and a watch found on or near the body had belonged to the person charged as having been murdered and that a valise found near by was his. *Held*. That this evidence was not "direct" within the meaning of the statute and that a conviction was improper.

The prisoner was convicted of murder in the second degree. The Penal Code, § 181, as amended by Chap. 384, Laws of 1882, provides that the death of the person and the fact of the killing are each to be established as independent facts, the former by direct proof and the latter beyond a reasonable doubt. The appellant here denies that the death of the person alleged to have been killed, one Bernard, has been established as a fact by direct proof. The dead body of a man was found. Clothing was on it and the lower part of the body was well covered up with dirt, leaves and moss. The skull was bare and detached

from the body, no scalp upon it. The flesh on the face and arms and upper part of the body was gone. No person on the trial identified the body as that of Bernard by anything upon the body itself. Evidence was given tending to show that the clothing and a hat, boots and watch found on or near the body and a valise found near by were those of Bernard. The condition of the body showed no mutilation, but was the result of decay.

L. L. Sheldon and J. R. Riley, for applt.

W. H. Dunn, for respts.

Held, That there was no direct proof of the death. Greenl., § 13, defines direct evidence as being where the thing to be proved is directly attested by those who speak from their own actual and personal knowledge of its existence; circumstantial where the thing to be proved is to be inferred from other facts satisfactorily proved. See also Wells on Cir. Ev., chap. 2, § 1; Powell's Ev., chap. 5. In cases of adultery it is commonly said that the fact of adultery need not be proved by direct evidence, and it is well understood by what evidence it may be proved. We must assume that in using the word "direct" the legislature used that word in its accepted meaning.

Certain articles said to have belonged to Bernard were found near this body. The question is not whether this evidence is very strong, or even convincing beyond a reasonable doubt. Is it direct? We think not. Direct evidence

would be positive identification or the pointing out of personal peculiarities. In the Beckwith case, lately decided, the body had been mutilated, and mutilated in places where it was alleged that there were personal peculiarities. This case is not like that in this respect.

Judgment and conviction reversed; new trial granted.

Opinion by *Learned, P.J.*; *Landon and Williams, JJ.*, concur.

MORTGAGE. TRUST.

N. Y. COURT OF APPEALS.

McPherson, respt., v. Rollins et al., impl'd., appltts.

Decided Nov. 29, 1887.

A mortgage conditioned for the payment of an annuity to the mortgagee during life and for payment to him or the general guardian of his children of a specified sum annually during their minority creates a trust in favor of the children, and the mortgagee cannot give a valid discharge thereof.

The record of such a mortgage is constructive notice of its provisions sufficient to put purchasers on inquiry and of the want of power in the mortgagee to discharge the mortgage.

Affirming S. C., 21 W. Dig., 254.

This was an action for the foreclosure of a mortgage. D. I., an infant, and the appellants were made parties defendant. The appellants answered claiming title as purchasers in good faith and for a valuable consideration. I. submitted her rights to the court, asking that her interest be adjudged. The issues were tried before a referee who found that one D., for the purpose of providing for his two daughters and their

children, made a division of his real estate, conveying the part now in question to his daughter F. As part of the same transaction F. executed a mortgage thereon, reciting that it was intended as security for the payment of \$250 annually to D. during his life, and for the further payment of \$50 annually to D. or the general guardian of plaintiff for plaintiff's benefit until she arrived at the age of fifteen and thereafter to D. or said guardian \$100 annually for the benefit of plaintiff until she arrived at the age of twenty-one. There were also provisions for the payment of like sums, on like conditions to I. Plaintiff and I. were granddaughters of D. and the mortgage recited that plaintiff was fourteen years of age April 1, 1873, and I., eleven years of age Oct. 10, 1872. The deed and mortgage were recorded in the proper clerk's office July 21, 1873, and until Feb. 16, 1875, were in the custody of F. In Feb., 1874, D., at the request of F. and without payment or other consideration executed a satisfaction of the mortgage, which was recorded Feb. 9, 1874, and a memorandum noted in the margin of the record of the mortgage: "Discharged on record of discharges of mortgages page 470." The premises were thereafter duly conveyed by or under the authority of F. to the appellants for a full and valuable money consideration paid by them. The referee also found that by the delivery and execution of the deed and mortgage in suit, an irrevocable trust for the benefit of plaintiff was created, which

deed the trustee had no power to annul or change; that the appellants had no actual notice prior to and at the time of their purchase of the existence of the mortgage as a subsisting lien upon the premises, but, that they then had constructive notice or notice sufficient to put them on inquiry as to that fact, which they were bound to regard; that no part of the annuity has been paid to plaintiff or I. A judgment of foreclosure according to the prayer of the complaint was rendered.

E. A. Nash, for applt.

A. J. Abbott, for resp't.

Held, That a valid trust was created by the terms of the mortgage as found by the referee, which continued to exist, 75 N. Y., 134; that as the appellants as intending purchasers must be deemed to have known every fact in relation to the title disclosed by the record, 46 N. Y., 384, and every other fact which an inquiry suggested by the records would have led up to, they are plainly chargeable with notice of the mortgages and of all the facts of which the mortgage could have informed them; that from its terms there was notice that plaintiff had a beneficial interest under the mortgage which would continue until 1880, and I., a beneficial which would continue until 1882; that the act of D., in satisfying the mortgage was not an act in the execution of his trust or warranted by it and as against the plaintiff and I. was of no effect. As to this the appellants must be presumed to have known the law.

Field v. Scheffelin, 7 Johns. Ch., 150, distinguished.

Judgment of General Term, affirming judgment of foreclosure, affirmed.

Opinion by *Danforth, J.* All concur.

WILLS.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Deborah C. Folk, *applt.*, v. Darwin Stocking et al., *respts.*

Decided Nov., 1887.

Testatrix by her will devised all the residue of her property and estate to her four daughters. By a codicil she gave all her real estate situated on a certain street to a son and daughter, describing it as her homestead, subject to all incumbrances. She had before this given a mortgage on a portion of this property describing it as her homestead. *Held*, That this fact did not cut down the extent of the devise as stated in the codicil, and that the codicil revoked the former devise to the daughters.

Appeal from judgment in favor of defendants.

One S. died in 1883, leaving a last will and a codicil thereto. By the will made in 1869 she charged her real and personal property with the payment of \$50 a year for a son, gave her household effects to a daughter, and gave the residue of her property and estate to her four daughters. By the codicil she gave to her son Darwin and daughter D. all her real estate situated on "the south side of Main in the city of Binghamton, being my homestead property, subject to all incumbrances thereon." Prior to making the will she had given Darwin a mort-

gage on the property described as follows: "On the north by Main street, * * * on the south by lands of the party of the first part, * * * ; the premises hereby conveyed are the homestead premises of the party of the first part and on which she now resides, and are six rods wide from west to east and sixteen rods deep from north to south." At that time she was the owner of a lot on the south side of Main street about six rods wide in front and five in the rear and about thirty-eight rods deep, and continued to occupy it as a homestead until her death, the lot was not fenced off except by a fence about seventeen or eighteen rods south of the street line, through which there were bars or a gate.

This action was brought by plaintiff, who was one of the daughters, claiming that the property devised by the codicil covered only that covered by the mortgage.

F. J. Dupignac and *A. A. White*, for *applt.*

Babcock & Harroun, for *respts.*

Held, That the judgment was correct. That the language of the codicil was used by testatrix with the intent and for the purpose of carrying to her son Darwin and to her daughter D. all the real estate which she owned on the south side of Main street in the city of Binghamton. At the time of the execution of the codicil the property was occupied by testatrix as a homestead and the words "being my homestead property" seem to be added by

way of a more full and complete description of the real estate of testatrix. The devisees named in the codicil taking through or under the will necessarily took the same subject to all incumbrances thereon, there being no contrary intent expressed by testatrix.

We are unable to see by the circumstance that she added to the phraseology which was adequate to carry the whole of her real estate on the south side of Main street to the devisees named in the codicil the words "subject to all the incumbrances thereon" that she thereby evinced any intent to restrict and cut down the force and effect of the words "all of my real estate situated on the south side of Main in the city of Binghamton" to such portion of her real estate as actually was incumbered by the mortgage to her son Darwin, although by that mortgage she had limited the description to the parcel "six rods wide from west to east and sixteen rods deep from north to south," and had in the mortgage declared that "the premises hereby conveyed are the homestead premises of the party of the first part." She had not thereby declared that the other portion of the premises lying further south than sixteen rods from Main street were not a portion of her homestead premises.

We recognize the rule that subsequent words of a will or of a codicil must clearly evince an intent to cut down an estate where the prior words are sufficient to give the fee. 81 N. Y., 356; 96 id., 63. But we are of opinion

that it was the intent of testatrix, by the use of the language found in the codicil, to give to her son Darwin and her daughter D., "all of my real estate situate on the south side of Main in the city of Binghamton."

Inasmuch as we are of opinion that the language of the codicil was used with the intent on the part of testatrix to carry all her real estate to the devisees named in the codicil, it follows that the language is inconsistent with the devise named in the third clause of the will, and therefore the codicil was a revocation of the language of the third clause. The codicil was a distinct, independent, subsequent testamentary instrument, evincing a clear intent to pass to the devisees named the whole of her real estate. The third clause of the will was, therefore, revoked by the codicil. 24 How., 54. The rule in such a case is well settled that "an inconsistent devise or bequest in the second of the testamentary papers is a revocation of the first. Thus, in case of a devise of the same land to two persons, while if the devises are in the same instrument the devisees may take jointly or in common; yet if they are found in distinct testamentary instruments the latter is a complete revocation of the former." 8 Cow., 56; 32 Bark., 328. We think the last disposition made by testatrix in her codicil operated on the whole of the real estate owned by her at the time of her death. Jarmin on Wills, 156, 158.

Judgment affirmed, with costs.

Opinion by *Hardin, P.J.*; *Follet, J.*, concurs; *Martin, J.*, not sitting.

ASSIGNMENT. EMPLOYEES.
PREFERENCE.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

In re settlement of accounts of
Eugene Heath, assignee.

Decided Oct., 1887.

A former employee of an insolvent who has assigned for the benefit of creditors under Chap. 466, Laws of 1877, is entitled to a preference in payment as provided by Chap. 283, Laws of 1886, in case his wages remain in fact unpaid at the time of the assignment, and although the employee has taken the assignor's note due at a future day, to secure payment of his wages.

Appeal from County Court order rejecting the claim of P. presented to the assignee as an indebtedness owing to him as an employee of the assignors and claiming preference in payment over the general creditors as provided in Chap. 283, Laws of 1886. The assignment was made April 10, 1885, and the claim was presented to the assignee July 14, 1885, and the same being rejected proceedings were taken resulting, May 11, 1886, in the order appealed from. There were funds sufficient in the assignee's hands to pay the claim in full if the same was entitled to preference. Plaintiff began service with the assignors as their traveling agent, in Jan., 1882, and continued in their employ until the latter part of Dec., 1884, at a salary of \$100 per month and his traveling expenses. At the end

of the first year a settlement was had between the parties and the balance found due to P. for his labor that year was \$517.04. At the end of the year 1883, another settlement was had and P.'s balance for that year was \$617.34. On Sept. 1, 1883, P. loaned the assignors a sum of money which with the balance of his wages unpaid at the end of the first year's service amounted to \$1750, for which he took their note at six months. This note was renewed March 12, 1884, the interest being paid to that date. On Nov. 26, the note was again renewed for \$1820 at six months. At the time of the last settlement the balance found due the claimant was \$360.84 which was then paid, and from that time he was not in the service of the assignors. In presenting the claim to the assignee for allowance and payment as a preferred debt, the claimant stated the same to be for his salary as an employee and insisted that the entire indebtedness as represented by the note was for services rendered. It does not appear that the note was presented to the assignee with an offer to surrender and cancel it, but no point was made on the assignee's behalf on that fact.

H. R. Durfee, for applt.

F. L. Brown, for assignee.

H. M. Field, for general creditors.

Held, That claimant's right to a preference in payment must be determined by the provisions of Chap. 283, Laws of 1886, which was in force when the order ap-

pealed from was entered, the amendment of 1884, Chap. 328, being then repealed. The words of the statute clearly indicate that the debt of an employee which is in fact unpaid at the time of the assignment is embraced in the preference without regard to the time when the wages were earned.

The claimant might surrender the note and base his claim on the unpaid debt as for services rendered. The proceedings should not be affirmed on the sole ground that it does not appear by the record that the note was surrendered up or tendered to the assignee for cancellation. If at the time when the note was taken or the renewals were made, it was claimant's intention to change the nature and character of his indebtedness against his employers and convert the same into a loan, and he received the note in payment of the original debt, the transaction had the legal effect to deprive him of the preference secured by the statute. But the fact of such intention has not been found, and we think a debt was owing the claimant for services at the time of the assignment, within the meaning of the statute.

We think, however, that the consideration for the note was money loaned, except as to the amount of the balance found due for the first year's wages.

So much of the decree is reversed as rejects and overrules the claim for a preference so far as it relates to the wages earned in 1882, and a rehearing is directed in the County Court on that sub-

ject, costs of this appeal to be paid out of the general fund in the assignee's hands if the claim is finally allowed as a preferred claim.

Opinion by *Barker J.; Smith, P.J.*, and *Lewis, J.*, concur; *Bradley, J.*, concurs in result.

CIVIL DAMAGE ACT.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Annie S. Ackerman, *applt.*, v. John Betz, *respt.*

Decided Oct. 26, 1887.

Evidence sufficient to require the submission of an action under the Civil Damage Act to the jury.

Appeal from judgment for defendant entered on verdict directed by the court.

Action under the Civil Damage Act, Chap. 646, Laws of 1873, to recover for loss of support. Plaintiff testified that her husband was in the habit of drinking at defendant's place; that she had seen him there on more than one occasion—a number of times; that she saw him drinking there; that he always had a glass of liquor or something before him; that his condition at such times was nearly always one of gross intoxication; that *she begged* defendant not to give him anything more to drink, and that defendant told him to go home, and said: "I promise you, Mrs. Ackerman, he shall never have another drop to drink in this place; that she had warned defendant before that time; that she was compelled to have her hus-

band arrested and sent to the island; that he did not live with her since he came out and had only contributed fifty cents a day for each child, and nothing for her own support for a year. She was corroborated as to the interview with defendant by her daughter, who testified that she had seen her father in defendant's saloon after that. Plaintiff also testified that she had never seen her husband in other saloons or took him out of any other place. Defendant testified that the husband never spent more than five or ten cents at a time, was never intoxicated at his place, and that he did not sell him anything more after the notification. Some other witnesses testified to seeing plaintiff's husband in other saloons, but were unable to state that they did so more than once.

The court refused to dismiss after the close of plaintiff's and defendant's testimony was in, but after the summing up directed a verdict for defendant on the ground that there was no evidence to show that the liquor was sold to plaintiff's husband which in any way caused the intoxication of which the wife complained.

Oscar Frisbie, for applt.

A. P. Fitch, for resp't.

Held, Error; that the jury should have been allowed to pass on the facts. In view of plaintiff's testimony, the point made by respondent that plaintiff did not say she ever saw her husband drinking any liquor in defendant's saloon, but merely said that she saw him drinking there, hardly merits seri-

ous consideration. A liquor dealer is not likely to say that a person shall never have another drop to drink in his saloon if he is *talking about water*, or if the person in question has not previously had liquor or some other intoxicating beverage to drink there. The testimony referred to, and there is more of a similar nature, would, if believed by the jury, fairly warrant the inference that the intoxication of plaintiff's husband when at defendant's saloon was caused in whole or in part by liquors furnished to him by defendant or his agents.

That the loss of support which plaintiff suffered was due to the intoxication of her husband brought about by what he drank at defendant's saloon rather than by what he drank elsewhere may not be so clear; but still there was quite enough evidence to that effect to take the case to the jury. Although he resorted to other drinking places the proofs show no such frequency of attendance elsewhere as characterized his visits to defendant's saloon, according to the testimony of the wife; and on the whole case we cannot say that the facts disclosed by the record would not have sustained a finding that plaintiff's straightened circumstances were attributable to the drunkenness of her husband, produced, to some extent at least, through the agency of defendant.

Judgment reversed and new trial granted, costs to abide event.

Opinion by *Bartlett, J.*; *Daniels, J.*, concurs.

RAILWAY. NEGLIGENCE.
EVIDENCE.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

Mary Bleyle, admrx., *respt.*, v.
The N. Y. C. & H. R. RR. Co.,
applt.

Decided Oct., 1887.

Action for damages for negligently killing plaintiff's intestate. Under all the circumstances of the case, *held*, that plaintiff made out a case for the jury.

Appeal from judgment for plaintiff on verdict at Circuit.

Action for damages sustained by the next of kin of Frederick Bleyle who was killed by defendant's train at the railroad crossing at Austin street in Buffalo.

The railroad tracks run north and south, crossing the street at grade and nearly at right angles. Deceased was riding alone in a one-horse wagon in Austin street, going east toward the crossing, and defendant's passenger train with which he came in collision was running north at a speed not less than twenty-five miles an hour. Parallel to each other and crossing Austin street are twelve or more tracks, of which six or seven are west of the one on which the train was running, and some of them are owned and used by other companies. On several of these other tracks, and on both sides of Austin street, were standing several lines of freight cars, leaving a space only twelve or fifteen feet wide for the passage of teams, and obstructing for a considerable distance the view of an approaching train from the south to a person

approaching the crossing from the west. A portion of the smoke-stack and about one foot of the tops of the passenger cars could be seen by persons standing west of the tracks and watching the train. Deceased was driving his horse about four miles an hour, and did not stop before attempting to cross the tracks. No flagman was stationed at the crossing, and none had ever been kept there. The whistle was blown once, loudly, but that was near a station half a mile from the crossing. The engineer and fireman of the train both testified that the bell was rung. Plaintiff's witness, Mrs. Roop, who at the time of the accident was riding in Tonawanda street, some 500 feet from the crossing, and who saw the train and decedent approaching the crossing, testified that she observed the train when it crossed Amherst street, and "watched" for the bell and it was not rung. Another witness who stood in his own door yard not far from where Mrs. Roop was, testified that he observed the train and its rate of speed; that between him and the tracks the ground was level and there was nothing to obstruct a full view of the train except the standing cars, and that he saw the train and heard the whistle blow when it was at the head of Tonawanda street, a point some 1,000 or 1,200 feet east of the crossing; that he saw the deceased driving along Austin street at the same time; that he saw the collision and that he did not hear any bell from the time he first saw the train. A witness called by defendant, whose

position relative to the crossing does not appear, stated he saw the train and heard the whistle blow and the bell ring as the train came up to the crossing. Defendant's servants in charge of the train were fully informed of the obstruction of view by the standing cars, although defendant was not chargeable with so placing such cars. Defendant moved for a non-suit, and also that verdict be directed in its favor, all of which was denied.

George C. Greene, for applt.

Stillwell & Hill, for respt.

Held, That upon the question whether the bell was rung, a case was clearly made for the jury. 71 N. Y., 228; 58 id., 451; 60 id., 133; 38 Hun, 569.

If the bell was not rung, the train crossed the street without giving any signal of its approach. In view of the obstructions caused by the standing cars, and the rate of speed of the train, it was a fair and reasonable deduction for the jury to make, that the train was not run with due and proper caution and that the collision resulted from defendant's negligence.

But the single circumstance that the bell was not rung would not establish a case against defendant, since the crossing was within the city limits, and the statutory requirement in that respect has no application; such omission would be simply a circumstance bearing on the general question of defendant's negligence.

If the bell was rung, it was not a case for granting a non-suit or ordering a verdict for defendant. The obstructions to the view and

the rate of speed of the train were elements for the jury to consider. 22 W. Dig., 155; 95 U. S., 161; 70 N. Y., 119; 58 id., 451.

One witness testified that she observed that as deceased passed on to the track between the standing cars he looked both ways. This evidence, with the obstructions to the view, made a clear case for the jury as to plaintiff's contributory negligence.

Judgment affirmed.

Opinion by *Barker, J.*; *Smith, P. J.*; *Haight and Bradley, JJ.*, concur.

SERVICES. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

James Barnes, respt., v. The Syracuse, P. & O. R. Co., applt.

Decided Nov., 1887.

In an action to recover for services performed for a corporation it is competent for plaintiff to prove a conversation with one of defendant's directors and executive committee in which plaintiff was notified of his appointment and an agreement made that he should commence and continue in the discharge of his duties, especially when it appears that the directors knew of his services.

Appeal from judgment in favor of plaintiff, on findings of fact made by the court.

Action to recover a balance alleged to be due plaintiff for services as chief engineer, performed between April and August, 1885, in the construction of a roadway.

On the trial plaintiff was allowed to testify to a conversation had with one P. in relation to such

services. It appeared by competent evidence that P. was one of the directors of defendant, and that he was a member of the executive committee, which had full power "to manage and direct the business and affairs of the company in such manner as it shall deem best for its interests in all cases in which special direction shall not have been given by the full board." It also appeared that after plaintiff had been appointed engineer-in-chief he was notified of the fact by P.

G. O. Vandebogert, for applt.
Avery & Merry, for resp't.

Held, That it was competent to prove by plaintiff that he received the notice from P., and that P. entered into an engagement with plaintiff that he should commence and continue in the discharge of his duties as engineer-in-chief. It appeared that the company knew of such services and acquiesced in their performance by plaintiff. The directors, and especially the president, visited the works during their progress and saw and knew of the engagement and occupation of plaintiff in the performance of his duties as such servant of defendant.

The case does not show that it contains all the evidence given on the trial. We must, therefore, assume that sufficient evidence was given to sustain the findings of fact made by the trial judge. 36 Hun, 193. We think the conclusion of law based on the facts found is correct.

Judgment affirmed, with costs.

Opinion by *Hardin, P.J.*; *Mar-*

tin, J., concurs; *Follett, J.*, concurs in result.

NEGLIGENCE. DAMAGES. EVIDENCE.

N. Y. SUPREME COURT. GENERAL
TERM. THIRD DEPT.

Freeman Murray, admr., *resp't.*,
v. Luke Usher et al., *appls.*

Decided Nov., 1887.

In an action for damages for negligence alleged to have caused the death of plaintiff's intestate, defendants offered to show, in mitigation of damages, that they had expended a large sum of money in caring for the deceased between the time of the accident and his death and also upon his funeral. *Held*, That the evidence was properly excluded.

Appeal from judgment in favor of plaintiff.

Action for damages for alleged negligence which caused the death of plaintiff's intestate. Defendants on the trial asked, "Was plaintiff's intestate taken care of between the injury and his death by these defendants?" This was objected to as incompetent and the objection sustained. Defendants proposed to show that they had paid \$2,000 in taking care of deceased and for his interment; and they urged that this was competent in mitigation of damages.

J. A. Vance, for applts.

N. L. Robinson, for resp't.

Held, That the evidence was incompetent. Defendants cite 89 N. Y., 24. The point here raised was not decided in that case and whatever was said upon it was *obiter*. One consideration seems to us sufficient to show this evidence improper. The injured party

could recover for bodily suffering. His personal representatives after his death cannot. If, then, defendants were allowed to show the payment to deceased of money his personal representatives should be allowed to show his bodily sufferings, for the money might have been paid for them. The result would be the introduction of an entirely improper element of damages.

Judgment affirmed.

Opinion by *Learned, P.J.*; *Landon* and *Williams, JJ.*, concur.

HIGHWAYS. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Thomas M. Rhines, *respt.*, v. The Town of Royalton, *applt.*

Decided Oct., 1887.

In an action against a town for injuries alleged to have been caused by defects in a highway, the court charged the jury that it was the duty of the town, in its corporate capacity, to keep and maintain the highways within the town in a reasonably safe and secure condition and to provide the funds necessary for that purpose, not exceeding in amount the sum authorized by law to be raised for that purpose. *Held*, Error.

Appeal from judgment on verdict in plaintiff's favor at Circuit, and from Special Term order denying defendant's motion for new trial.

Action for damages alleged to have been sustained by plaintiff while traveling on a highway in the town of Royalton, caused by the same being in an insecure and unsafe condition. The evidence on plaintiff's behalf tended to

show that the highway was out of repair and in a dangerous condition at the place where plaintiff received his injuries, and that the commissioner had information of the fact; also that the commissioner was guilty of neglect of duty in not repairing the roadway out of the moneys in his hands which might have been properly used for that purpose, or in neglecting, if those funds were insufficient for that purpose, to procure the necessary money in a manner provided by statute. The judge, in his charge, instructed the jury, in substance, that it was the duty of the town, in its corporate capacity, to keep and maintain the highways within the town in a reasonably safe and secure condition and to provide the funds necessary for that purpose, not exceeding in amount the sum authorized by law to be raised for that purpose.

Wm. C. Green, for *applt.*

Brundage & Chipman, for *respt.*

Held, That the charge was erroneous. The town in its corporate capacity has no control over highways and is under no legal obligation to keep highways and bridges in repair. The commissioners of highways are State officers chosen by the electors of the town, but they do not act for the town in the discharge of the duties imposed on them by law. 74 N. Y., 310; 75 id., 316. The act of 1881, Chap. 700, has not produced any change of the law as laid down in the cases cited. 40 Hun, 190.

Defendant's duty toward the

public in keeping the highways and bridges in repair was erroneously stated to the jury and the true ground of the town's liability to plaintiff, if it was liable at all, was not mentioned. The mind of the jury was misdirected, and the jury may have been misled to defendant's prejudice.

As to what will constitute such neglect of duty on the part of a highway commissioner as to support an action against him for injuries resulting from such neglect, see 44 N. Y., 113; 24 Hun, 472.

Judgment and order reversed, new trial granted, costs to abide event.

Opinion by *Barker, J.*; *Smith, P.J.* and *Bradley, J.*, concur; *Lewis, J.*, not voting.

JURISDICTION. JUSTICE'S JUDGMENT. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Wilson Agar et al., respts., v. Mary J. Tibbets et al., exrs., appls.

Decided Oct., 1887.

The jurisdiction of inferior courts, dependent as they are upon the statute for authority, will not be presumed, but must appear to support their judicial action.

By the force of the statute and within its provisions and purposes, providing for the filing with the county clerk transcripts of judgments rendered by a justice of the peace and docketing such judgments, transcripts of such judgments failing to show jurisdiction are *prima facie* sufficient evidence of judgments to authorize the clerk to issue execution, and to support the title of purchasers on execution sale.

When the creditor seeks to make his judgment the subject of another action he proceeds to charge the judgment debtor for a debt evidenced by his judgment; and whether it was a judgment or not before the transcript was filed and the entry by the clerk depends upon the fact of jurisdiction of the Justice's Court which rendered the judgment, and unless the transcript filed shows such jurisdiction it is not sufficient evidence, even *prima facie*, to support a judgment.

Appeal from order of Special Term denying motion for a new trial and from order confirming report of referee, and from the judgment therein entered against defendant in a proceeding to determine a claim made against the estate of defendant's testator, and rejected by her.

The claim is founded upon a judgment alleged to have been recovered April 30, 1869, in Justice's Court, a transcript whereof was filed and judgment docketed in the office of the clerk of Wyoming County May 1, 1869.

The following is a copy of the transcript so filed: "State of New York, County of Wyoming, ss. Transcript of a judgment, rendered by and before D. N. Jencks, a justice of the peace of the town of Warsaw in said county.

In Justice's Court, *Wilson Agar* and *Alanson Burr v. Jasper Keeney*. On the 30th day of April, A.D., 1869, judgment was rendered in favor of the plaintiffs against defendant for a cause of action arising on contract; debt, \$102.65, costs \$2.65, total \$105.30. Transcript, 30.

"Wyoming County, ss. I, D. N. Jencks, a justice of the peace

of said county do hereby certify that the foregoing is a correct transcript from my docket of a judgment on record in my office and of the whole of said judgment. Dated this 30th day of April, 1869, D. N. Jencks, Justice of the Peace."

At the time the motion was made for the confirmation of the referee's report defendant made a motion for a new trial on a case and exceptions, which was denied.

The only evidence of the judgment of the justice was the transcript of the justice filed with the county clerk. Defendant took the objection on the hearing that no jurisdiction of the person named as defendant in the judgment appeared in the transcript.

E. E. & G. W. Harding, for applt.

I. Sam Johnson, for respt.

Held, It is a fundamental principle that jurisdiction of inferior courts, dependent as they are upon the statute for authority, will not be presumed, but must appear to support their judicial action. 1 Hill, 139. Such is the character of courts of justice of the peace, and while the statute provides for proof of their judgments by authenticated transcripts made by the justice, 2 R. S., 269, §§ 246 and 247; Code Civ. Pro., § 939, the transcripts must show jurisdiction to constitute evidence sufficient to give effect to the judgments. 5 Wend., 292; 19 id., 477.

That the provision of the Code Pro., § 63, that on the filing and docketing by the clerk "the judgment shall be a judgment of the

County Court" does not provide what it shall contain further than that it be a transcript of the judgment rendered by the justice of the peace, and it has been held under an earlier similar statute in that respect that the appearance of jurisdiction in the transcript filed with the clerk was not essential, and that "the judgment so docketed furnished at least *prima facie* evidence of the right to execution, and was sufficient to authorize the clerk to issue execution, and sufficient evidence of authority of the officer to sell and of the existence of the lien to enable the purchaser to recover in ejectment." The doctrine of those cases has been recognized in the more recent cases. 25 Barb., 102. It must therefore be assumed that an entry of the docket by the clerk of a judgment may effectually be made upon the filing of a transcript failing to show jurisdiction of the justice to render the judgment, and that the judgment of the court so produced needs for the support of execution of it by process issued upon it no proof further than the transcript so filed. The judgment becomes practically the judgment of the County Court, and is beyond the control of the justice. 32 Barb., 50; 30 Hun., 163.

That the reasons which apply to the effect of proceedings and their results founded upon execution issued upon the judgment so docketed do not necessarily govern in an action brought upon it. The statute gives to the judgment the effect of a lien on real prop-

erty and provides for the issuing of execution for the purpose in that manner of enforcing the collection of the judgment, and as a consequence *prima facie* vesting the title in the purchasers on sales made by virtue of the execution.

That when the creditor seeks to make his judgment the subject of an action to recover another judgment upon it the reasons which give support to an execution do not seem to be applicable, nor is such remedy within the terms of the statute, as it is not taken in execution of the judgments; but in such case the creditor proceeds to charge by action the judgment debtor as for a debt which is alleged to be evidenced by the judgment; and whether it was a judgment or not before the transcript was filed and the entry made by the clerk depends upon the fact of jurisdiction of the Justice's Court by which it was rendered. The act of procuring the transcript and depositing it with the clerk is wholly *ex parte*, and except for the purposes of its execution provided by the statute it is not apparently or in fact any more a judgment after than before such entry is made in the clerk's office, and whether it has the legal effect of a judgment depends entirely upon the jurisdiction of the inferior court by which it was rendered. The designation of it as a judgment of the County Court in view of the decisions and the purpose of the statute does not give it validity unless it had that character before the justice; and no propriety appears for extending its

prima facie effect beyond the reason of the rule requisite to effectuate the apparent purpose for which the statute was enacted.

Judgment and order reversed and new trial granted, costs to abide final award.

Opinion by *Bradley, J.; Smith, P.J., and Barker, J.*, concur.

RAILWAY. EMINENT DOMAIN.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

In re application of the Niagara Falls & Whirlpool Railway Co. to acquire real estate of the Deveaux College for Orphan and Destitute Children et al.

Decided Oct., 1887.

By the statute it is made a condition precedent to the right of a railroad company to institute proceedings to condemn lands of which it cannot acquire title by purchase, to give notice of the proposed location of its route to all actual occupants from whom the company has not acquired title.

Proceedings to condemn lands for the use of the petitioner. The lands are described in the petition as being in two separate parcels. On the hearing it was established that the company had not served written notice on all the actual occupants of land over which the proposed route was located which had not been purchased by or given to the company of the time and place where the map or profile of the proposed road had been filed and that the line of the road passed over the lands of such occupants. The Deveaux College, the

only land owner before the court on this appeal, was served with the requisite notice more than fifteen days prior to the institution of these proceedings. Commissioners were appointed to appraise one parcel of land described in the petition and refused as to the other. Both parties appeal from the order.

Sprague, Morey & Sprague, for petitioner.

Ellsworth & Potter, for Deveau College.

Held, Every statutory condition precedent to the taking, by any mode, of private property for public use as against the will of the owner, must be strictly complied with. 93 N. Y., 405; 79 id., 71.

The statute makes it a condition precedent to the right of a railroad company to institute proceedings to condemn lands of which it cannot acquire title by purchase to give notice of the proposed location of its route to all actual occupants from whom the company has not acquired title. 45 N. Y., 364; 49 id., 356. The college has neglected its opportunity to apply for the appointment of commissioners, but if it had applied within the time allowed by statute none could have been appointed, because notice has not been served upon other actual occupants entitled to be heard on the appointment of commissioners. When those parties are served they will have the right to apply for a change of the route, and on the hearing before the commissioners the college, with all other interested parties, will be

entitled to be heard. See 12 Abb. N. S., 21; 62 Barb., 85; 13 Hun, 211.

So much of the order as is appealed from by the petitioner is affirmed, and so much of the same as is appealed from by the college is reversed, with \$10 costs and disbursements to the college.

Opinion by *Barker, J.*; *Smith, P.J.*, and *Bradley, J.*, concur; *Lewis, J.*, not voting.

DEED. DELIVERY.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

May Messelback, *respt.*, v. Frederick H. Norman, treasurer, *applt.*

Decided Nov., 1887.

Where a grantor causes a deed to be recorded it is *prima facie* evidence of delivery and the deed will be held effectual even though the grantor did not inform grantees of its execution, especially when no dissent is shown upon their part.

Appeal from judgment in favor of plaintiff.

Action on a policy of insurance against defendant as treasurer of the company. The main defense was that plaintiff was not the owner of the property. It appeared that plaintiff had been owner in fee. In Nov., 1879, she executed a warranty deed to her children. It appeared on the trial that the children had paid a considerable sum toward the price and value of the property. Plaintiff acknowledged the deed and took it from the county judge who drew it. About a month afterward she brought the deed to him and asked to have it recorded, paying the fees. This

deed was recorded and the grantees have not reconveyed. To obviate the objection, plaintiff testified that she thought the deed a will and did not mean to have it take effect during her life. That she had kept possession and had never told her children of the deed. The county judge testified that he read the deed to plaintiff in part and that nothing was said of a will. Plaintiff succeeded below.

A. H. Sawyer, for applt.

H. T. Sandford, for resp't.

Held, Error. It is true that a delivery of a deed is necessary, but causing it to be recorded is *prima facie* evidence of delivery. 16 Peters, 106; 23 Wend., 43; 6 Barb., 98; 91 Mass., 102; 15 Wend., 545. In the absence of any proof to the contrary the delivery to the county clerk for record must be taken to have been for the use of the grantees. It is not shown that they refused to accept it. They may have known of the deed, although the grantor did not tell them of it. It is not shown that any misrepresentations were made by the person who drew the deed to the grantor. There was also a moral consideration for the deed, as the grantees had contributed to the price.

The policy was to be void if the assured was not the sole, unconditional owner or if the interest of the assured was not truly stated. We think on the evidence there could be no recovery. 29 Conn., 68.

Judgment reversed and new trial granted, costs to abide event.

Opinion by *Learned, P.J.*; *Landon* and *Williams, JJ.*, concur.

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EXECUTION. EXEMPTION.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Clarence J. Knapp, *resp't.*, v. Thomas R. O'Neill, *applt.*

Decided Nov., 1887.

Proof that a judgment debtor is a householder having a family for which he provided and owned and used a horse in his business, that such horse was worth less than \$150 and that he had no other property named in § 1391 amounting with the horse to \$250, is sufficient to show that the horse is exempt from sale on execution.

The debtor is entitled to choose his own business to support his family, and it is not error to refuse to charge that if it was possible to do so in some other way the horse was not exempt.

Appeal from judgment in favor of plaintiff, entered on verdict.

Action to recover the value of a horse owned by plaintiff and claimed to be exempt, sold by defendant as sheriff on an execution against plaintiff. Plaintiff gave evidence tending to show that he was a householder, having a family for which he provided, and that he owned and used in the prosecution of his business the horse in question when defendant levied on and sold it. He also showed that the value of the horse was \$150 or less, and that he had not other personal property named in § 1391 amounting with the horse to \$250.

Homer Weston, for applt.

William M. Ross, for resp't.

Held, That there was proof sufficient to warrant the jury in finding that the horse was exempt within the language of § 1391, and

its verdict was, on the questions of fact, controlling. 1 Den., 642; 1 T. & C., 444. See also 15 Barb., 568; 31 N. Y., 653.

It has been settled that "one horse" is covered by and included in the word "team." 1 Duer, 606; 31 N. Y., 653; 32 Barb., 290; 9 Hun, 44; 27 Barb., 505.

Also held, That the trial judge was correct in his instruction that the burden of proof was on plaintiff in respect to the facts essential to carry the case within the protecting provisions of the statute, and that put the case to the jury in a more favorable aspect for defendant than he was entitled to.

If plaintiff used the horse in any branch of business, such as collecting accounts, carrying passengers or letting the horse for hire, which plaintiff was carrying on to gain support for himself and family in whole or in part, the horse was exempt within the humane spirit of the statute, which has always received a liberal construction in favor of the parties protected by it. "The exemption in the statute was not made to depend on the pecuniary ability of the debtor; it is a benign and remedial statute enacted for the benefit of families from the highest motives of public policy." 57 Barb., 641. Plaintiff was entitled to select his own business to support in part or in whole his family. It was not error to refuse to charge that "if it was possible to support his family in some other way, the horse was not exempt." In *Cogsdill v. Brown*, 5 Hun, 341, it was said the owner "had the

right to retain the property and find use for it."

Also held, That no error was committed in excluding the particulars of the transactions between plaintiff and his aunt. The evidence did not seem to be relevant to or important to any issue arising on the trial.

Judgment affirmed, with costs.

Opinion by *Hardin, P.J.*; *Follett* and *Martin, J.J.*, concur.

REPLEVIN. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Hiram D. Hurd et al., *respts.*, v. Adaline S. Burch et al., *appls.*

Decided Nov., 1887.

After plaintiff had testified from recollection to alleged false representations made to him by defendants' agent and which induced him to make the sale in question, he was allowed to introduce a memorandum made at the time of the conversation, which contained the items of the goods sold and also a statement of the alleged representations. *Held*, Error; that the memorandum was unsworn evidence and introduced only to fortify the credibility of the witness.

In an action of claim and delivery the referee must find the value of the property at the time of trial.

Appeal from judgment in favor of plaintiffs entered on report of referee.

Action of replevin brought to recover from Burch's assignee lumber sold to her by plaintiffs upon the ground that her agent made false representations to one of the plaintiffs. This plaintiff testified positively from recollection to the false representations.

Plaintiffs then offered in evidence a memorandum made by this witness at the time. This contained the items, and also contained a statement of these representations now alleged to be false. The witness said he read these items to the agent, but did not read to him the statement of representations. Under exception this memorandum was received.

E. P. White, for appls.

L. A. Serviss, for respts.

Held, Error. This written statement was not sworn evidence. The witness had before testified what the representations were. To give the writing in evidence was only to show that the witness had on a former occasion written down, without oath, the agent's statements which the witness had now given under oath. It was an attempt to strengthen the credibility of the witness. The memorandum was not necessary to refresh the memory.

Nor was this a memorandum made in the course of business like entries in books. Such entries relate to the sale of goods and to mercantile transactions, and not to things said. The testimony of witnesses must be given under oath. This evidence was a violation of that rule. This view is important, because the witnesses contradict each other upon the question of what the representations were. Plaintiff cannot be allowed to strengthen his side by this memorandum.

There is a further difficulty in the case. The referee has not found the value of the property at

the time of trial. This is necessary. The property may have depreciated in value without defendant's fault since it was taken. In such case the loss falls on the owner, and plaintiffs have been decided to be the owners. This rule is especially important where the defendant is not the original wrongdoer, but only assignee.

Judgment reversed and new trial granted, costs to abide event,

Opinion by *Learned, P.J.*; *London* and *Williams, JJ.*, concur.

WILLS. TRUSTS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Lilly V. Graham, respt., v. The N. Y. Life Ins. & Trust Co., *applt.*

Decided Oct. 26, 1887.

By the will of testator a sum of money was bequeathed to defendant in trust for the life of his daughter, and on her death testator gave one-half to plaintiff subject to the proviso in the next subdivision, which was that in case of her death in the lifetime of her father and without issue the fund should go to other relatives of testator. *Held*, That plaintiff took a defeasable title; that on the death of the life tenant the trust ceased and plaintiff was entitled to possession of the fund.

Appeal from judgment sustaining demurrer to answer.

Action to recover a legacy deposited with defendant under the will of one H., plaintiff's grandfather. By the seventh paragraph of his will H. bequeathed to defendant \$100,000 in trust to invest and apply the interest to the use of his daughter Eliza Graham, plaintiff's mother, during

her life, and on her death to divide said sum in two equal parts and testator gave one of said parts to plaintiff subject to the proviso in the next paragraph. The eighth paragraph provided that in case plaintiff was vested with said share and died intestate during the life of Augustus Graham, her father, and without lawful issue such share should go to other relatives of testator.

On the death of her mother, but during the life of her father, plaintiff demanded payment of her share of defendant, and on being refused brought this action, setting up the above facts. Defendant answered alleging that under the will plaintiff was not entitled to immediate possession, but that in case of the contingency provided for the fund would belong to the other relatives named, and asked for a construction of the will. Plaintiff demurred to the answer and the demurrer was sustained.

Emett & Robinson, for applt.

A. C. Brown, for resp't.

Held, No error. That the title which plaintiff took under these clauses of the will was a defeasible title depending upon the fact that she should survive her father, or in case she did not that she should have lawful issue to whom the money would descend as her next of kin. And if there was a failure in both these respects that then it should go to his son or the sisters of his wife and their issue as directed in the proviso.

That this contingent disposition of the fund was not repugnant to

the gift to plaintiff, for all that testator did was to give the money to plaintiff subject to this contingency. Her title was a qualified title, and while it became vested, in the language of the proviso, it was still vested subject to the contingency already mentioned. No power was given to her to dispose of the fund, but it appears to have been intended and expected that she would retain it to the period of her decease, and that then it would be subject to the contingent directions predicated on that occurrence. And where that may be the nature of the bequest, and no power to dispose of the fund or property bequeathed is given to the legatee, there this contingent disposition has not been considered so far repugnant to the bequest as to render it in the least degree inoperative. 3 Kern., 273; 16 N. Y., 83; 22 id., 558; 47 id., 512; 96 id., 164.

Van Horne v. Campbell, 100 N. Y., 287; *Campbell v. Beaumont*, 91 id., 465, distinguished.

But while her title is qualified and contingent in this manner she has still by the will been entitled to the money on the decease of her mother. The execution of the trust created for her mother's benefit was all that under the will defendant had to do with this fund. As soon as that was determined, as it was by her decease, it became its duty to pay over this sum of money to plaintiff, and it was no part of its concern that other parties might become interested in or entitled to the fund at the period of her decease. If it

had been given to her for life, or she had been vested with the right only to the interest or income, the case would have been different from that which is presented by the will, and there she would not be at liberty to take possession of the fund without securing to the ultimate contingent legatees their final right to the money. 24 Hun, 120; 8 Paige, 152; 68 N. Y., 485. But where the intention of the testator appears to be, as it has in this case, that the legatee shall take the fund itself and possess and control it subject to the future contingency, there such security is not required without at least some evidence proving the fact to be that the ultimate contingent interests will be imperilled by her possession without security. 17 Abb. N. C., 339.

That plaintiff was entitled to costs, for the action was brought to recover a sum of money directly payable to her on the decease of her mother, and when that fact became known to defendant it was its duty to pay over the fund. But as its defense was evidently made in good faith for the protection of such interests as others might finally have in the fund and the case cannot be said to be difficult or extraordinary the allowance should not have been granted.

Judgment reversed as to allowance and refusal of commissions to defendant, and as modified affirmed, without costs.

Opinion by *Daniels, J.*; *Van Brunt, P.J.*, and *Brady, J.*, concur.

MUTUAL INSURANCE. SUICIDE.

N. Y. SUPREME COURT. GENERAL TERM. FOURTH DEPT.

Carrie L. Meacham, respt., v. The N. Y. State Mut. Benefit Ass'n., applt.

Decided Nov., 1887.

An occasional use of intoxicating liquors by the insured is not inconsistent with an answer in his application that he is of temperate and correct habits.

The question whether such use amounted to a breach of the conditions of the policy and whether the insured died from dissipation or the excessive use of ardent spirits is for the jury.

Evidence sufficient to show that suicide was committed under influence of insanity and was not a voluntary act.

Appeal from judgment in favor of plaintiff, entered on verdict, and from order denying motion for new trial on the minutes.

Action on a certificate or policy of insurance issued by defendant dated Aug. 4, 1884. Application was made to one M., an agent of defendant, on Aug. 12 by H., the insured, who was the husband of plaintiff. The policy provided that if the answers made in the application, which were made conditions of membership, were found untrue it should be null and void. The by-laws of defendant provided that it should not be liable when the member died in violation of the laws of the land * * * or immorality, dissipation, or the use of narcotics or from suicide, if committed within two years from the date of the certificate. On Aug. 22, 1884, H. was at a house five miles from home; at noon

next day he was at a house a mile from home, and at 3 P.M. was at home, shaved himself, changed his shirt and wrote a letter in which he said: "But the voice says 'die now.' Darling, don't give this revolver away until Clare is big enough to take care of it, then give it to him and tell him its history. * * * Oh! that voice is calling me. I think it is mother's. * * * Now, wishing you all farewell I am no more your unworthy husband, but almost a corpse." He then used a revolver, causing a bullet to pass through his head, causing immediate death.

To the question in the application "Is applicant correct and temperate in his habits?" he answered "Yes," and to the question "Does applicant promise to remain temperate?" the answer was "Yes." Evidence was given showing several irregularities on different occasions; on the other hand it was shown that his general bearing and habits were good. The question was submitted to the jury.

Fuller, Fuller & Cook, for applt.

A. P. & D. C. Smith, for respt.

Held, No error. An occasional use of intoxicating liquors by the insured was not inconsistent with the answer given to the question. The question seems to refer to a habit in the use of intoxicating liquors that was "customary and habitual, rather than to a single or incidental one." 9 Hun, 583; 70 N. Y., 605. Whether the evidence established a breach or not was a proper question for the jury,

and their finding on that subject should not be disturbed by this court. The views already expressed on this question bear upon the second question raised on the progress of the trial as to whether deceased remained a man of temperate and correct habits.

It was claimed that the insured fraudulently concealed an intent entertained at the time of procuring the policy to commit suicide. The judge charged "Did he have that fraudulent intent when he obtained it and concealed it from defendant? If he had it, the evidence is that he concealed it. So the question is, whether he obtained this insurance policy with that intent. If he did, then plaintiff cannot recover in this action, and your verdict must be for defendant."

Held, That the language fairly presented the question to the jury.

It was also claimed that defendant's agent was misled by the insured by a statement that he was engaged in the business of a detective, and that the statement was made to induce the company to accept the risk; the fact being that he worked on a farm.

Held, That whether the representation was made in a serious manner, or whether it was a jocose remark, was properly a question for the jury after hearing all the testimony on the subject. The agent seems to have been anxious to obtain the risk, as all insurance agents usually are. And according to his testimony the application was written by the agent before the remark relating to the

detective business was made. A careful reading of his testimony leaves a reasonable doubt as to whether he relied on or paid any attention to the remark. It is apparent from his testimony that after he had written the application and sent it to the company he derived additional information in respect to the insured and that he made no effort to revoke the application or prevent the certificate being issued.

Also held, That there was no error in submitting the question to the jury as to whether the insured died from dissipation or from the excessive use of ardent spirits, and that on the whole evidence before the court the question was one of fact.

It was also claimed that there was a breach of the certificate because the insured committed suicide.

Held, *Untenable*. It has recently been held by the Third Department that suicide is not a violation of the Penal Code. 42 Hun, 245; *id.*, 252. In *Newton v. Mut. Ben. Life Ins. Co.*, 76 N. Y., 426, it was held, *viz.*: "Where a person who, although aware that a certain act will terminate his life, yet does the act under the control of an insane impulse caused by disease and derangement of his intellect which deprives him of the capacity of governing his own conduct in accordance with reason the act cannot be regarded as voluntary. Such an act, therefore, is not within the provision of a policy of life insurance avoiding it in case the insured die by his

own hand." See also 55 N. Y., 169. We think the trial judge followed the cases to which we have alluded in laying down the law to the jury in regard to the defense as to suicide, and that the evidence was sufficient to warrant the jury in finding "that he acted under the control of an insane impulse caused by disease and derangement of his intellect which deprived him of the capacity of governing his own conduct in accordance with reason."

Also held, That such finding is not against the weight of evidence. The solution of the question turns largely on the interpretation of the facts and circumstances attending the conduct of deceased just before and at the time of committing suicide. That the letter written by deceased to his wife is strong evidence supporting the conclusion reached by the jury. What mind in a normal condition could suggest that a revolver which was used to take the life of a parent should be preserved as a keepsake for a child of the party using it?

Judgment and order affirmed, with costs.

Opinion by *Hardin, P.J.*; *Follett, J.*, concurs.

JUSTICE'S COURT. ATTORNEYS. PENALTY.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The Village of Suspension Bridge, *applt.*, v. George Bedford, *respt.*

Decided Oct., 1887.

Parties have the right to appear by attorneys in Justices' Courts, authorized to manage and control the conduct of suits; and when they do so appear the stipulations of such attorneys bind their principals.

In an action for a penalty when the evidence is insufficient legitimately to produce an inference entitled to the character of evidence to that effect, and it appears that the defendant raised the question of the sufficiency of the evidence to establish a case against him, the County Court is justified in reversing the judgment of a justice of the peace for insufficiency of the evidence to fairly justify the recovery.

Appeals from three judgments of Niagara County Court reversing judgments of Justice's Court.

It appeared that four actions were commenced in Justice's Court before the same justice by plaintiff against defendant to recover penalties for alleged violations of an ordinance of the village which prohibited any person acting within its limits as a common hackman, porter, or as driver of any cab, carriage, omnibus, stage coach of any description, baggage or other wagon used for hire without first obtaining a license therefor from the board of trustees of the village under a penalty not less than \$5 and not exceeding \$25 for every offense. The actions were commenced on Aug. 5, 6, 7, and 10, 1885. Issue was joined in the action first commenced. It was tried and judgment rendered in favor of plaintiff, which was affirmed by the County Court. In the other three actions respectively stipulations were made to the effect that the evidence and pleadings in the first action should be considered the pleadings and

evidence in them, and that the justice render judgments therein the same as if tried and such evidence adduced in them, "except that the evidence with reference to the violations of the ordinance * * * shall be treated and regarded as referring to the date of the commencement" of those actions respectively, and the question is whether upon these stipulations and in view of the pleadings and evidence in the first suit the judgments of the justice rendered in those actions and reversed by the County Court can be supported.

Charles W. Johnson, for applt.

Thomas E. Erving, for resp't.

Held, That the objection taken because the stipulations were made by the attorneys as such for the parties was not well taken. While there is no presumption of authority of attorneys for parties in Justices' Courts as in Courts of Record, they may employ attorneys to appear for them with ample powers to manage and control the conduct of suits.

That the stipulations add nothing to the evidence. They do not contain any admission that defendant violated the ordinance, but it is sought to apply by them the evidence as given to the days after and other than the 5th of August. If the evidence of violations of the ordinance by defendant embraces the period within which are the 6th, 7th, and 10th of August it may be seen that the stipulations can be given the required effect to apply the evidence in support of the judgments of the

justice, but inasmuch as the evidence and all appearing in the case fails in terms to show that defendant was engaged in driving any cab or carriage on any day following the fifth up to and including the tenth of the month, although some facts appear which furnish a reason to suppose he was, but hardly sufficient to produce a legitimate inference entitled to the character of evidence to that effect, for the purpose of charging defendant with a penalty, and as it appears that in each case by the return defendant raised the question of the sufficiency of the evidence to establish a case against him, we are inclined to think that on the ground of the insufficiency of the evidence to fairly justify the recoveries the County Court was permitted to reverse the judgments.

Judgment affirmed.

Opinion by *Bradley, J.; Smith, P.J., Barker and Haight, JJ.*, concur.

TELEGRAPH. NEGLIGENCE. N. Y. SUPREME COURT. GENERAL TERM. SECOND DEPT.

Alfred C. Wolfskehl, *respt.*, v. The Western Union Tel. Co., *applt.*

Decided Dec., 1887.

A telegraph company is liable to either the sender or receiver of a message for damages.

Either party to a telegraph message, whether the sender or the receiver, who sustains damages from negligence in its transmission may maintain an action against the telegraph company for their recovery.

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Appeal from judgment in favor of plaintiff.

Action by the receiver of a telegram against the company based on the negligence of the latter in the transmission of the message. The complaint charged the negligent omission of the word "not" from the message and its delivery to plaintiff in that changed condition, and his action on the incorrect message by which he sustained damage. Defendant demurred to the complaint and the court overruled the demurrer.

Defendant claimed that it owed no duty to plaintiff in the transmission of the message as it sustained toward him no contractual relation, and that only such persons as sustain such relation to the company can have a remedy against it.

Dillon & Swayne, for *applt.*

H. Graves, for *respt.*

Held, Untenable. While telegraph companies have not been made chargeable with the absolute liability of common carriers, yet they are engaged in a public employment for hire and bound to exercise care and diligence adequate to the obligations they assume to transmit messages safely and correctly and avoid errors and mistakes, and in this sense they are common carriers, and so much of the law of common carriers becomes applicable to telegraph companies. They undertake to transmit communications from one to another, and they hold themselves out to the world as possessing the skill and ability to perform that service with accu-

racy and dispatch. They thus undertake the performance of a peculiar service for a stipulated reward, paid either by the sender or the receiver, but the service and duty is undertaken for the benefit of both, and either party sustaining damage from the negligent performance of such duty should have a remedy by action against the company for their recovery. It seems consonant with the settled principles of the law to hold defendant responsible to plaintiff in this action.

Judgment affirmed, with costs.

Opinions by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

CONTRACT. DAMAGES.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John E. Savery, *respt.*, v. Robert G. Ingersoll, *applt.*

Decided Oct., 1887.

Defendant having failed to keep his agreement to deliver a lecture upon receiving a certain sum from plaintiff, the latter to be entitled to the whole sum realized from the sale of tickets, *held*, that plaintiff's loss of profits was an element of damage to be considered by the jury. And although by the contract it was made a condition precedent that defendant should be paid before lecturing, yet having repudiated the contract, defendant could not demand performance of such precedent condition.

Appeal from judgment on verdict in plaintiff's favor.

Action for breach of contract. Plaintiff gave evidence tending to prove that defendant agreed to visit the city of Auburn, where plaintiff lived, and deliver a lec-

ture for \$250, plaintiff to have the sale and proceeds of the admission tickets. The evidence as to the making of a contract and the terms thereof is substantially the same as on the former trial, and we do not change our opinion on that point, as then expressed. 24 W. Dig., 450. On the question of damages the court, besides other instructions which were not challenged, charged the jury that plaintiff was not entitled to recover anything by way of damages except those which they could see by the evidence he had sustained, and all uncertain and speculative damages that were matters of guess and conjecture should be rejected; "but all such damages as you can clearly and fairly see the plaintiff has sustained by the loss of such profits, as you clearly and fairly see he would probably have made, you may allow him." To the last part of these instructions, defendant excepted. Plaintiff sought to prove that defendant named Jan. 20, 1878, as the day he would visit Auburn and deliver the lecture. To maintain this fact, plaintiff was permitted to testify in his own behalf that he received at Auburn, on or about Jan. 5, a telegram purporting to come from defendant, naming Jan. 20 as the time for the delivery of the lecture; and that he immediately replied by telegram, stating that the time mentioned was satisfactory to him. It was admitted that the originals of both of these messages had been destroyed by the telegraph company, and plaintiff testified that

the copy of the one he received was lost. Plaintiff was asked: "Did you have a communication; or did you receive a telegram purporting to come from Mr. Ingersoll some time after the conversation in Syracuse?" and he answered in the affirmative. Again plaintiff was asked: "What was the telegram you sent in answer to the one you received?" Objections to these questions were made by defendant. Defendant moved for nonsuit on the ground that it was made a condition precedent by the terms of the contract that plaintiff should pay defendant the consideration money agreed upon before the lecture was delivered.

Woodin & Warren, for applt.

A. J. Parker, for respt.

Held, That the damages assessed by the jury, in view of the instructions they received from the court, were in their opinion the certain and direct result of the breach of the contract, and to such damages plaintiff is entitled, and the charge was correct. 10 N. Y., 489; 2 Stark., 107; 7 Hill, 61; 39 N. Y., 129; 101 id., 205.

The first question and answer objected to as above were entirely competent, as the evidence simply proved that the parties to the contract had been in correspondence relative to the execution of the contract, and neither the question nor the answer revealed the contents of the telegram.

As to the next objection, it was competent to prove the contents of the message by parol, the original message having been de-

stroyed. 100 N. Y., 446; 7 Allen, 548; 50 Vt., 316.

In view of the fact that the contract was to be performed at Auburn, and necessarily required defendant's personal attendance, it would be an unreasonable construction of the contract to say that plaintiff was to pay the consideration at any time previous to defendant's attendance at Auburn to deliver the lecture. Moreover, the jury were justified in finding that defendant entirely repudiated his contract and did not intend to perform it. In that case, plaintiff was excused from performing the condition precedent. 69 N. Y., 286.

Judgment affirmed.

Opinion by *Barker, J.; Smith, P.J., Haight and Bradley, JJ.*, concur.

CRIMINAL LAW. MURDER.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The People, *respts.*, v. Robert Brunt, *applt.*

Decided Oct., 1887.

While evidence of premeditated design is sufficient to constitute the crime murder in the second degree, since the enactment of the Penal Code §§ 183, 184, the design to effect death must be established by the evidence to have been deliberate as well as premeditated to permit a conviction of murder of the first degree, and without such evidence a conviction for a greater offense than murder in the second degree cannot be sustained.

The addition of the word "deliberate" requires some appreciable time for reflection preceding the killing, but the celerity of mental action is such that the formation of a definite purpose may not occupy more than a moment of time,

the time occupied after the intent in drawing the revolver from the pocket may have been sufficient and it was not requisite that the anger should have abated.

Appeal from judgment upon conviction of defendant at Oyer and Terminer of the crime of murder in the first degree. Defendant with a pistol shot and killed William E. Roy in the County of Wyoming. The contention of his counsel is that conviction of the crime of murder in the first degree was not justified, because the evidence did not fairly permit the conclusion that the act was committed with deliberate and premeditated design to effect the death of the person killed, although he may have intended to kill Roy. The deceased and his half sister Eva Roy were sitting in the front room of their father's house, and defendant came from his sleeping room on the second floor down stairs into the room, where they were, and when within a few feet of the deceased fired the fatal shot.

L. W. Thayer, for applt.

E. M. Bartlett, Dist. Atty., for respts.

Held, It may be assumed that the jury were warranted in finding that he did this with the premeditated design to kill Roy, which was sufficient to constitute the crime of murder in the second degree; but since the design to effect death must be deliberate as well as premeditated to permit conviction of murder of the first degree, Penal Code, § 183, such additional requirement must be

established by the evidence to permit such result; and without it conviction cannot be for a greater offense than murder in the second degree. *Id.*, § 184. Hence the question is whether the evidence was such as to justify the conclusion of the jury.

Defendant, a young man about twenty-two years of age, came to Castile in the spring of 1886, became acquainted with Eva Roy, a girl of about sixteen years of age, and in Aug. of that year went to her father's house to board, and soon became engaged to marry Eva Roy, and continued to board there until the crime was committed. The deceased, William Roy, was a half brother of Eva, who worked away from home and came there occasionally, and defendant became jealous of him and the evidence shows used threatening language in reference to him and his relations with his half sister. On the evening of the 6th of Oct., 1886, the defendant had returned from his work to the house about nine o'clock and shortly after Eva and William came into the dining room from where her mother and defendant were sitting, they all remained together for a little while when the mother and William went into the front sitting room, leaving defendant and Eva alone. The mother a while after called to Eva to come into the sitting room and said to her and defendant it was time to go to bed. Defendant went up stairs to his room, Eva went into the sitting room, William was there and they

sat in that room. The father was in the same room lying on a lounge, and the mother went into a bedroom adjoining to get a small child to sleep. It seems to have been understood by the family that William was going away that night on a midnight train. Between twelve and one o'clock in the morning defendant was heard by Eva coming down stairs, and she testified that she saw him peering through the doorway, that he went back upstairs and returned to the same place, and after standing there and looking as before he returned to his room, and immediately came down the stairs and after again looking from the stairway he came into the room where she and William were sitting; that he approached near where she was sitting and said to her, "Eva, I thought your mother told you to go to bed;" that she answered, "she did when I was sitting with you, but she found out that Will was going away, and she said I could sit up until the train"; that then he walked in a circular line around where William sat and to a place opposite, between which and the place occupied by William stood a sewing machine and a small stand, there he stopped and said, "Your mother was very anxious to have me go to bed so that you and Will could sit up and spark wasn't she?" to which no reply was made, that she then asked her brother to tell her where he was going, and he said to her "Lean over and I will whisper it to you," which she did, and that instant defendant fired,

shooting William in the head. It is contended by defendant's counsel that this act was without reflection, and wholly the result of impulse suddenly produced by anger caused by the suggestion so made by William. And defendant testified that until she had leaned toward the deceased and their heads came near together, the pistol had remained in his pocket and he had no thought of injuring him, that up to that time he had no thought of shooting, and remembered nothing of his thoughts at the time he drew his revolver and fired; that he had no thought of doing so the moment before.

Held, That if the jury had adopted his statement they should not have convicted defendant of the crime of murder in the first degree, and if they entertained any reasonable doubt of the fact of his deliberate as well as premeditated design to kill the deceased, then their duty should not have permitted the conviction of the offense, because to justify such result every reasonable hypothesis consistent with innocence in respect to any element of the crime must be excluded by the evidence in the view legitimately taken of it by the jury. The circumstances, however, were such as to permit an interpretation of the act of shooting somewhat different from that furnished by defendant's evidence before mentioned.

That if the jury disregarded the evidence of defendant in that respect, they might upon the evidence have found that defendant

provided himself with the revolver at the time he left his room to come down stairs, by the fact that his habit was to take the pistol from his pocket when he went to his room to retire, and upon the evidence of Eva that after he looked through the stairway door he went back to his room and *immediately* came out and down the stairs, and proceeded into the room where she and William were sitting, and in view of the other evidence relating to his suspicious feelings toward William and his jealousy, his remarks and threats previously made and his subsequent statements, permitted the inference that when he saw those persons sitting together his jealous indignation was such that his return to his room was to provide himself with the weapon; that he took it and immediately proceeded down stairs. While time intervening between the impelling cause, real or imaginary, and the act, is an element upon the question whether the killing is the result of deliberation, the requisite time for such purpose can be measured by no rule other than that furnished by the circumstances of each case.

That the term "premeditated design" substantially takes the place of that of "malice aforethought" or "malice prepense" used in indictments at common law, and the time requisite to constitute it may not be distinguishable from that of the act of killing, although it must be a premeditated act. 7 N. Y., 385; 37 id., 413. The addition of the

word deliberate requires some appreciable time for the reflection preceding the act of killing, but the celerity of mental action is such that the formation of a definite purpose may not occupy more than a moment of time. 91 N. Y., 211; 10 Abb. N. C., 261. The time occupied after the intent in drawing the revolver from his pocket may have been sufficient time for the requisite deliberation, and to constitute this condition it was not necessary that the anger of defendant should have subsided, or that his excitement produced by the occasion should have abated. 77 N. Y., 62; 88 id., 196.

No occasion appears on this review to interfere with the result.

Judgment affirmed.

Opinion by *Bradley, J.; Smith, P.J., and Barker, J.*, concur.

MERGER.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

George Clements v. Alfred H. Griswold et al.

Decided Nov., 1887.

Plaintiff in 1862 was mortgagor of premises belonging to S. and J. Lamb. In July, 1869, they executed two mortgages, one to plaintiff and one to Barnett. These latter mortgages were foreclosed at one time in March, 1873, and the same referee deeded half to plaintiff and half to Barnett and one Rice. The judgments in these foreclosure actions reciprocally provided that the judgment in one action should not affect any prior lien of the plaintiff in the other action. In June, 1873, plaintiff conveyed his half to one Griswold and one Keith, and by his deed stated that he conveyed the rights he acquired on the foreclosure sale and no

more. Griswold and Keith knew that plaintiff intended if he could to keep his senior mortgage alive. *Held*, That plaintiff's mortgage of 1862 did not merge when he acquired title in March, 1873, and continued a lien as well upon the half of Griswold and Keith as upon the half of Barnett and Rice.

Action to foreclose a mortgage made to plaintiff for \$5,000 by Samuel and James Lamb, dated March 1, 1862. The complaint was in the usual form. Defendants Rice and Barnett are tenants in common with defendants Griswold and Keith as owners. They alleged payment, merger, release and extinguishment. On July 1, 1867, the Lambs executed simultaneously two mortgages on their premises, one to plaintiff and the other to Barnett, each for \$6,000. Barnett assigned his mortgage to the North Granville National Bank. Both mortgages were simultaneously foreclosed by action and were sold at one time, March 5, 1873, by the same referee, one-half to plaintiff and the other to Barnett and Rice. The judgment in plaintiff's foreclosure action provided that the judgment should not in any manner affect any prior lien of the bank, and a like clause was inserted in the bank's judgment that it should not affect any prior lien of plaintiff. On June 23, 1873, plaintiff conveyed his half to Griswold and Keith with covenants against the grantor and this clause: "Intending to convey all the right acquired by me on purchase of the same on foreclosure sale March 5, 1873, and no more." Griswold and Keith knew plaintiff held the mortgage in suit

and that he wished to retain it as a lien on the premises conveyed to them, and they had already refused to accept a deed which recognized plaintiff's mortgage as an existing lien. The referee directed judgment charging Barnett and Rice's half with one-half of plaintiff's mortgage, but declaring Griswold and Keith's half released. All parties appeal.

L. H. Northup, for plff.

James Gibson, for defts.

Held, That the direction of the referee charging one-half of the mortgage upon the premises of Barnett and Rice was correct. Their purchase of the Lambs' equity of redemption was subject to plaintiff's senior mortgage and the judgment expressly provided that this lien should not be impaired. And the foreclosure of a junior mortgage could not affect a senior mortgage unless expressly adjudged upon some equitable ground. 75 N. Y., 122.

The referee erred as to the premises of Griswold and Keith. In equity plaintiff's mortgage on his own land was not merged unless he so intended. While he held both the title and the mortgage, whether they should merge was no one's concern but his. Until he conveyed no one could raise the question. The referee held that although plaintiff's mortgage did not merge in his title, yet because he held both title and lien he released the lien. The case cited, 91 N. Y., 470, if examined will prove not to be an authority for this proposition. That case does not apply to a situation like this where

upon the purchase of the equity of redemption it was intended to divide the lien of the prior mortgage equally between the undivided share purchased by plaintiff and that purchased by Barnett and Rice. The deed to Griswold and Keith was expressly qualified by the words "and no more," and they had already refused a deed expressly recognizing the mortgage. It is clear that plaintiff intended to keep it on foot and Griswold and Keith intended to reserve any defense they might have. What plaintiff bought on the foreclosure sale was the equity of redemption and that was all he sold.

Judgment affirmed as to Barnett and Rice and reversed as to Griswold and Keith.

Opinion by *Landon, J.*; *Learned, P.J.*, and *Williams, J.*, concur.

PROBATE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

In re will of Sarah Freeman.

Decided Nov., 1887.

At the request of the attorney who drew a will the physicians came to the house of the testatrix on the night the will was drawn to become attesting witnesses. Neither of them had ever attended her. They examined her mental condition and consulted together about it. They said nothing to her about her health and she understood that they were there only to become such witnesses. *Held*, That § 834 did not apply and that their testimony was competent.

The only important question in this case arose from the facts. The subscribing witnesses were when the will was executed practicing physicians and sur-

geons. Neither of them had ever attended the testatrix. She was confined to her bed. On the evening when the will was executed, at the request of the attorney who drew the will, these physicians were called in to become subscribing witnesses and made an examination as to the mental condition of testatrix. The will was then duly executed. One physician made a charge against the attorney for the services rendered. The surrogate admitted the will to probate.

J. W. Houghton, for contestants.

W. H. McCall, for proponents.

Held, That § 834, under which section objection was made, did not apply. The relation of physician and patient is one of contract. The patient employs the physician to examine his condition and if necessary to administer remedies. Of course it is not necessary that a remedy should be administered, but there must be an employment or the services must be accepted by the patient. 101 N. Y., 126; 92 id., 297; 103 id., 573. Here the deceased was conscious and capable of acting. She did not accept the services and they were not employed to attend her in a professional capacity. They did not converse with her as to her health. There is no reason to think that the deceased regarded these physicians in any other capacity than as proper witnesses to her will.

Decree affirmed.

Opinion by *Learned, P.J.*; *Landon, J.*, concurs., *Williams, J.*, dissents.

ANIMALS. VICIOUS DOGS.

N. Y. SUPREME COURT. GENERAL
TERM. SECOND DEPT.

John H. Keenan, by guardian
respt., v. The Gutta Percha &
Rubber Mfg. Co., *applt.*

Decided Dec., 1887.

One who harbors a dog with knowledge
that it has attacked a human being is re-
sponsible for all subsequent injuries in-
flicted by the animal. The question of
actual ownership is immaterial.

Notice to an agent of a corporation of such
fact is notice to the corporation.

Appeal from judgment in favor
of plaintiff and from order deny-
ing motion for a new trial.

Action to recover damages to
plaintiff resulting from the bite of
a dog kept on the premises of
defendant. The dog that inflicted
the injury was a slut with a brood
of pups, and while plaintiff, who
was employed by defendant, was
preparing food for her and the
pups she seized his leg and bit it,
and when she was beaten off
seized the other leg and bit that
also. She had bitten another boy
eight or ten months previously
and that fact was known to de-
fendant's foreman, but the dog
was still harbored, the bookkeeper
of defendant furnishing money for
its food.

At the close of plaintiff's case
defendant moved to dismiss on the
ground of absence of proof to show
vice in the dog or to connect de-
fendant with her as owner or
keeper, or to show notice of any
vicious propensities of the animal,
and that notice that she had bit
another person was insufficient to

charge defendant with such notice.
The motion was denied.

Pelton & Poucher, for *applt.*

J. S. Ross, for *respt.*

Held, No error. The liability
for injuries inflicted by animals
depends upon their propensity to
do mischief. If, therefore, a per-
son keeps a mischievous animal
with knowledge of its propensities
he must keep it secure at his peril.
If the animal be of a savage dispo-
sition the owner is chargeable
with knowledge, and proof of that
fact is equivalent to proof of ex-
press notice. 8 Barb., 634; 73 N.
Y., 199. To what proof of savage
ferocity is an owner entitled be-
yond notice of an attack on a hu-
man being? Such attacks are in-
cited only by vicious propensities
and are open manifestations of the
possession of a savage disposition,
and no dog can with safety be per-
mitted to live after such an exhi-
bition of its inclination, and the
person who thereafter harbors such
an animal with knowledge of its
past conduct manifests a reckless
disregard for the safety of his fel-
low beings and should be held re-
sponsible for all subsequent injur-
ies inflicted by the animal. In the
old English case of *Smith v. Pelah*,
2 Strange, 1264, it was said by
the court: "If a dog has once bit a
man and the owner having notice
thereof keeps the dog and lets him
go about or lie at his door, an ac-
tion will lie against him at the
suit of a person who is bit, though
it happens by such person treading
on the dog's toes; for it was owing
to his not hanging the dog on the
first notice. And the safety of the

king's subjects ought not afterward to be endangered." See also 17 Wend., 496; and 4 Den., 500, where it was held that evidence of the good character and disposition of the dog was inadmissible after proof of the injury and knowledge of the owner that the dog had bit other persons.

The proof that the dog was harbored by defendant is uncontradicted and beyond doubt. She was upon the premises of defendant with a litter of pups at the time of the laceration, and plaintiff who was in the employ of defendant was feeding her or preparing her food, and the bookkeeper of defendant furnished money to buy food for the animal twice a day. The question of actual ownership is quite immaterial. Whoever keeps such an animal is liable for the mischief it perpetrates. The basis of the action is the wrongful keeping of the dog with knowledge of its vicious disposition. Addison on Torts, Par. 261.

Also held, That notice to the foreman of defendant was notice to the corporation. Corporations can be charged with negligence in no way other than by showing some carelessness or omission of its agents. The wrong or negligence in this case consisted in keeping the animal after she bit the first boy, and that was with the knowledge of the foreman and the bookkeeper, that is the bookkeeper knew the dog was kept on the premises of defendant.

The Court of Appeals in our State in the two cases of 73 N. Y., 195; *id.*, 347, has placed the law

on a sound and humane basis by deciding that one who keeps a vicious dog with knowledge of its propensities is liable for injuries caused by it, and that negligence in the ordinary sense of the word is not an element of the cause of action, nor is contributory negligence a defense.

Judgment and order affirmed, with costs.

Opinion by *Dykman, J.*; *Barnard, P.J.*, and *Pratt, J.*, concur.

INJUNCTION. CONVERSION. REPLEVIN.

N. Y. SUPREME COURT. GENERAL
TERM. THIRD DEPT.

Alfred C. Van Wagoner, *applt.*,
v. Ezekiel Terpenning, *respt.*

Decided Nov., 1887.

An injunction restraining one from disposing of or in any manner interfering with personal property does not prevent the party from bringing an action for damages where the property is wrongfully taken out of his possession by a third party, and it *seems* he might bring an action to recover it.

Action to recover personal property and the defence the statute of limitations. Plaintiff was, in March, 1875, living on premises where this property was and some other articles also his. He was then evicted by the sheriff under a writ of assistance in foreclosure, and defendant, the purchaser, was put in possession. On the same day the sheriff in an execution for the deficiency levied on this property and sold some of it. Plaintiff claims defendant then took possession of the property

not sold. This action was begun in Jan., 1883, a demand was then made and a demand was also made in April or May, 1875. It appeared that in 1874 plaintiff's wife brought an action for separation and therein obtained an injunction served June, 1874, restraining plaintiff from disposing of or interfering with her personal property and the personal property now in question was thus enjoined. In 1877, plaintiff brought an action for divorce against his wife and obtained judgment. In 1877 the former action for a separation was dismissed and the injunction dissolved. The referee held that this action was not brought within six years and the appellant now insists that the statute did not run while he was enjoined.

A. T. Clearwater, for applt.

F. L. & T. B. Westbrook, for respt.

Held, That the referee was correct. The injunction order did not forbid this plaintiff to bring an action against the defendant or any one else who had taken and converted the property. The object of the injunction was to preserve the property. If taken from plaintiff by any one except his wife it would seem no violation of the order for plaintiff to recover it. And he certainly could have brought an action for damages. 41 Barb., 337. The case in 25 Hun, 616, is different. There the plaintiff was enjoined from collecting firm assets. To bring an action there would certainly be an interference with firm prop-

erty. In the present case the action for conversion was not the property as to which the court had enjoined this plaintiff. The court had forbid his interference with certain chattels. But his right of action against the defendant was not one of these chattels and there was no injunction in respect thereto. That right of action did not exist when the injunction was served. And if the property were the wife's such an action as this could do her no harm and if the property had been taken by a third party she might have lost it entirely.

Judgment affirmed.

Opinion by *Learned, P.J.*; *Landon* and *Williams, JJ.*, concur.

USURY. ESTOPPEL. NEW TRIAL.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Lyman A. Brown, applt., v. *Ira E. Martin, respt.*

Decided Oct., 1887.

A promissory note by its terms payable with lawful interest, made by A. for the accommodation of B. and by the latter indorsed and transferred to C. for less than its face is void, and the defense of usury complete to an action brought upon it by C. unless defeated by estoppel. And when inquiry is made by C. of A. before or at the time of purchase of such a note then made, and A. characterizes the note as given for value, good and all right, A. is estopped as against C. to effectually assert usury as a defense.

There is no apparent reason why the same rule should not apply to representations in respect to a note to be made. It is sufficient for *estoppel en pais* that the representations made by defendant were

calculated to mislead plaintiff and did have that effect.

Where the evidence is such as to present a question of fact for the jury such that it would have been error to withdraw the case from their consideration by a nonsuit or direction of a verdict for the defendant, and the relation of the witnesses to the subject of the action whose evidence related to the main fact was such that their credibility was for the consideration of the jury in determining what the evidence given by them respectively proved, it presents a case so peculiarly within their province that it is difficult to see how the court could so measure the force which the jury gave to the evidence as to reach the conclusion that the verdict was so against the weight of the evidence as to justify a new trial.

Appeal by plaintiff from order of Monroe Special Term granting a new trial.

Action upon a note for \$200 payable to the order of S. B. Pratt at sixty days with interest. Defendant alleges usury as the defense. Plaintiff had a verdict, and the court at Special Term granted defendant a new trial. The evidence on the part of defendant was in the testimony of the maker and Pratt the indorser, who testify that the note was made by Martin without consideration, and for the accommodation of his son-in-law, Pratt, to enable the latter to get a loan upon it of plaintiff, who advanced to him for it \$195.

Plaintiff's evidence is, Pratt said: "I have a note that I want to sell you," that it ran sixty days and was against defendant. Then plaintiff asked if it was gotten up to raise money on and he answered "No sir, it was given for a valuable consideration," that defendant owed him, and said Martin

was at the Webster House, "you can ask him about the note." Plaintiff then called on defendant, told him what Pratt had said, and asked him if the note was gotten up to raise money and defendant answered, "No sir, the note is given for value, and if you can make a deal with the Colonel, Pratt, buy it, for it is good and all right and will be paid." Plaintiff then asked Pratt to see the note, and he made the remark that the note was not yet drawn, and plaintiff then told him that "if the note was given for value, not gotten up to raise money," he would give him \$195 for it. He said all right. he would do it. Plaintiff got the money, returned to Webster House where defendant and plaintiff still were, paid the \$195 and took the note.

J. Henry Metcalf, for applt.

Burhite & Reed, for respt.

Held, Assuming that it was an accommodation note, made to enable the payee to raise money upon it, the note in the hands of plaintiff was void, and the defense complete unless defeated by estoppel. The evidence of plaintiff permitted the conclusion that the negotiation between him and Pratt was for the sale and purchase of a valid note, founded on a good consideration, that when inquiry was made of defendant, who was named by Pratt as maker, he in like manner characterized the note as given for value, good, and all right; and that he then understood that plaintiff did not want the note if it was gotten up to raise money. If the note had been then

made by defendant and taken by Pratt this evidence of plaintiff, taken as true, would have been sufficient to justify the conclusion that the maker was estopped as against plaintiff to effectually assert usury as a defense. 3 Abb. Ct. Ap. Dec., 207; 72 N. Y., 108; 84 id., 354; 90 id., 110.

That there is no apparent reason why the transaction to its completion might not be deemed characterized by the representation in respect to the quality of the note to be made. It is sufficient for *estoppel en pais* that the representations made by the defendant were calculated to mislead the plaintiff and did have that effect, and induce him to make purchase of the note in the manner that he did, and that to give effect to the denial of the truth of them would result to the prejudice of the plaintiff. 50 N. Y., 575; 69 id., 113.

That the evidence was such as to present a question of fact for the jury, and it would have been error to withdraw the case from them by a nonsuit or by direction of a verdict for defendant. The relation to the subject of the action of the witnesses whose evidence related to the main fact was such that their credibility was for the consideration of the jury in determining what the testimony given by them respectively proved. And this was so peculiarly their province that it is quite difficult to see how the court could so measure the force which the jury could legitimately give to it as to reach the conclusion that the verdict was so against the weight of evi-

dence as to justify the granting of a new trial. The case is one of the conflict of evidence.

Order reversed and motion for new trial denied.

Opinion by *Bradley, J.*; *Haight* and *Corlett, JJ.*, concur.

TOWN BONDS. FRAUD.

N. Y. COURT OF APPEALS.

Farnham, applt., v. Benedict, respit.

Decided Oct. 18, 1887.

Town bonds were delivered to defendant as president of a railroad, who after the time to construct the road had expired sold them to *bona fide* purchasers. The proceedings to organize the company were claimed to be fraudulent and the road was not built. *Held*, That an action was maintainable against defendant in favor of the town.

It is essential to the organization of a railroad company that \$1,000 for each mile shall be subscribed and 10 per cent paid in cash; payment by check is not sufficient.

The cause of action arose immediately on the bonds being negotiated and was not affected by Chap. 577, Laws of 1880, and that defendant was not relieved from liability by the fact that he had accounted to the railroad company for the proceeds of the bonds.

Reversing S. C., 23 W. Dig., 144.

Plaintiff as supervisor of the town of Attica, Wyoming County, brought this action to recover damages from defendant for having sold certain bonds of said town which were in his possession without title and purported to have been issued pursuant to the town bonding acts, to aid in the construction of a proposed railroad pretended to have been incorporated under the name of the Attica

& Arcade RR. Co. The complaint alleged that defendant had been actively instrumental in the organization of the pretended RR. Co. and knew it to be a sham organization, formed without compliance with the general railroad law and gotten up fraudulently for the purpose of being used to initiate proceedings for the issue of town bonds, such organization having been based upon a false affidavit knowingly made by defendant; that he had instigated and as an attorney had conducted the subsequent proceedings for bonding the town; that he had obtained possession of the bonds and after the five years within which the charter required the construction of the road should commence had expired he had sold the bonds to *bona fide* holders who had purchased them on his assurance that they were valid.

L. W. Thayer, for applt.

W. F. Cogswell, for respnt.

Held, That the action was maintainable.

It appeared that on Feb. 24, 1870, the defendant and other citizens of Wyoming County met and subscribed written articles of association stating that under the general railroad law of 1850 they formed the A. & A. RR. Co., that the road was to be about twenty-five miles long, the capital stock \$250,000 to be divided into 2,500 shares of \$100 each. The articles then set out the names of the defendant and twelve other persons as the directors for the first year. At the same time defendant and others subscribed for 241 shares,

and thereupon defendant and two other directors swore to the affidavit required by § 2 of the Act of 1850, that the amount of the stock required by said section had been subscribed and 10 per cent thereof paid in in good faith to the directors named in the articles of association, and said articles with such affidavit annexed were filed in the office of the secretary of state. The act required that before the articles were filed \$1,000 of stock for every mile of railroad proposed should be subscribed and 10 per cent thereof paid in good faith and in cash to the directors. The pretended payments were made by checks and in two instances by promissory notes. The majority of persons who gave such checks had no account or funds at the banks on which they were drawn and they and the notes were given with the understanding that they were not to be paid but were to be returned to the makers.

Held, That the provisions of the general railroad law were not complied with and therefore no corporation was in fact organized; that the mere filing of articles of association would not constitute a corporation *de jure*; that the proceedings by which the company purported to organize was a gross fraud on the general railroad act; that it is a condition precedent to the formation of a railroad corporation that at least \$1,000 for every mile of road proposed to be constructed shall be subscribed and ten per cent. paid thereon in good faith and in cash.

Under Chap. 907, Laws of 1869, the act under which the bonds in question were issued, the existence of a railroad corporation having power to issue stock or bonds to be given to the municipal corporation, and to construct the road to be aided, lies at the foundation of the power to issue municipal bonds.

Also held, That if the petitioners for bonding the town had known that the affidavit attached to the articles of incorporation was false, that knowledge would not be material to this case, as by procuring the town to be bonded the petitioners imposed a burden not merely on their own property, but also upon that of the taxpayers who did not sign the petition or approve the scheme, and who were at liberty to contest the validity of the bonds until by defendant's sale of them to *bona fide* holders the town and taxpayers who had not consented to the bonding were deprived of availing themselves of the defense.

Also held, That the RR. Co. having failed to comply with the provision of Chap. 775, Laws of 1867, requiring it to begin the construction of its road and expend thereon 10 per cent. of its capital within five years from the time of filing its articles of association, its corporate existence and powers, if it ever had any, ceased, and the bonds issued by it became void.

Also held, That Chap. 598, Laws of 1875, passed after the forfeiture and before the negotiation of the bonds by defendant cures a forfeiture only in case of a failure to

complete the construction within ten years. Said act relieved companies that for any cause had been unable to construct their road within the time limited by providing that the time for the completion of the road should be extended for a further term of two years.

Also held, That immediately upon the bonds being negotiated by the defendant a cause of action accrued against him in favor of the town, either in the nature of an action of trover for the face of the bonds or for money had and received from the amount realized from their sale. 73 N. Y., 269, 305; 12 id., 313.

It was found that defendant accounted to alleged RR. Co. for the proceeds of the bonds.

Held, That this did not relieve him from liability.

Also held, That Chap. 577, Laws of 1880, passed June 22, 1880, which relieved the RR. Co. of all forfeitures by reason of its failure to comply with the requirements of law relating to the construction of railroads by companies formed under the general railroad act, did not have the retroactive effect of taking away a right of action which accrued in 1875; that this section is violative of § 18 of Art. 3 of the Constitution, which prohibits the legislature passing any local or private bill granting to any corporation, association or individual the right to lay down railroad tracks.

Judgment of General Term, affirming judgment for defendant, reversed, and new trial ordered.

Opinion by *Rapallo, J.* All con-

cur, except *Ruger Ch. J.*; *Andrews* and *Finch, JJ.*, not voting.

DEEDS. ESTOPPEL. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Martha W. Thompson, admrx.,
respt., v. Nelson Stever, *applt.*

Decided Nov., 1887.

J. S. owned two farms, adjoining. He had bought the southerly farm from one M. S. whose grantor was C. S. J. S. mortgaged the northerly farm and described its southerly boundary as bounded "by lands formerly belonging to C. S. and M. S." *Held*, That he was estopped by this recital in the mortgage thereafter to set up an adverse possession of any part of the southerly farm, as the same was owned by C. S. and M. S.

Where an old deed contained a general description and then referred to a survey by courses and distances and stated that the same was delivered to the grantee and this survey was recorded in the book immediately after the deed, but was not properly certified, and the farm was thereafter repeatedly conveyed and in each case reference made to the record of the old deed, *Held*, that, if the survey was not admissible as a record, it was still admissible as a description sufficiently identified as the one adopted by the parties.

Action to recover some wood cut upon a lot by plaintiff's intestate. He was in possession of the lot claiming under a paper title. Defendant admitted the taking, but also claimed the lot. The court directed a verdict for plaintiff. The parties owned adjoining farms which formerly belonged to one Jonathan Stever. In 1863, while owning both Jonathan Stever mortgaged the northerly or

"homestead" farm and upon a foreclosure in 1877, defendant got title to it. The boundary between the farms was described in the mortgage and in the referee's deed as "southerly by lands * * * of the party of the first part (Jonathan Stever) formerly belonging to Christopher and Myron Shults." Jonathan Stever had gotten the southerly or Shults farm from Myron Shults in 1861; and Stever's executors in 1877 had conveyed it to plaintiff's intestate. Christopher Shults had conveyed it to Myron in 1858, and John Martin to him in 1847. The court held that the disputed boundary must be decided by ascertaining the boundary of the Shults farm as conveyed by Myron Shults to Stever; and this showed the wood to have been cut on plaintiff's land. Defendant offered to show that when Jeremiah Stever bought the Shults farm and since 1854, Jonathan was and had been in possession of the *locus in quo* claiming to own it as part of the "homestead" farm. This was excluded.

McClellan & Brown, for *applt.*

Newkirk & Chace, for *respt.*

Held, That the evidence was properly excluded. Jonathan Stever was concluded by the description in his mortgage. At the time he made that description he owned both farms. Even if in 1854 he had begun an adverse possession as against Christopher Shults he could not take advantage of it, when in 1863, by his own choice, he mortgaged the "homestead" farm by a descrip-

tion which made its southern boundary line the land formerly owned by the Shults.

Exception was taken by defendant to the admission of a description of the Shults farm by courses and distances. The deeds in evidence showed that in 1829 Elisha Williams conveyed the farm to one P., who in 1837 conveyed to Martin, Christopher Shults' grantor. The description in Jonathan Stever's deed is the same with that in Elisha Williams'. Elisha Williams' deed contained only a general description and then said "formerly belonging to John Tallmadge now in the occupation of James Tallmadge, containing 202 acres one quarter and 22 rods according to the survey thereof made by Roger Kennedy on the 10th day of June, 1828, a copy whereof is herewith delivered. In the deed book the record of this deed is followed by a record of this survey by courses and distances and this latter record states "the survey bill of which the above is a copy is attached to the deed from Elisha Williams and Lucia his wife to Frank Punderson recorded immediately preceding this survey." The record of the survey is not certified. This was probably admissible as a record. 97 N. Y., 411. But if not thus admissible we may assume from the recital in the deed that with it the grantor delivered to the grantee the survey bill; and this as between them became an original although in fact a copy, and was a part of the deed itself. 32 Barb., 374. We may presume

the grantee had it recorded. And when he became grantor and referred to the record by book and page and added by reference thereto "it would more fully and at large appear," we may assume that he intended to refer to all that was therein recorded touching the Shults farm. That reference in substance was continued until the deed to Jonathan Stever. We know therefore that this is the description which the parties adopted and hence it was properly given in evidence.

Judgment affirmed.

Opinion by *Landon, J.*; *Learned, P.J.*, and *Williams, J.*, concur.

RIPARIAN OWNERS. ESTOPPEL.

N. Y. COURT OF APPEALS.

The N. Y. Rubber Co., *applt.*,
v. Rothery et al., *respts.*

Decided Nov. 29, 1887.

In an action for diversion of water it was claimed that there was no injury as there was always water in the stream by plaintiff's lot for domestic purposes. The evidence showed that there were times when none flowed past plaintiff's lot and that it was not returned in time to reach that part which it would otherwise touch. *Held*, That the evidence raised an issue for the jury.

Mere silence of one owner to object to an erection by the other raises no presumption of a grant or license, and in the absence of a duty to speak will not constitute an estoppel.

This action was brought to recover damages sustained by plaintiff by reason of defendants diverting the water of creek from passing its property. It appeared that

plaintiffs had a factory on said stream a little below a factory belonging to defendants and that plaintiff also owned two lots of land opposite the factory and property of defendants. Defendants averred that their use of the water of the stream was not unreasonable or illegal or in any way inconsistent with the rights of plaintiff; that plaintiff's lots are on the opposite side of the stream from their land, and that no machinery can be placed on the lots to be propelled by water as plaintiff has no land upon which to erect a dam, and there is no fall in the stream between plaintiffs land and defendant's tailrace, so that the only use that plaintiff could have for the water in the stream is for domestic purposes and defendants claim that as there is always water in the stream by plaintiff's lots for such purposes its rights as a riparian owner have not been injured. The evidence tended to show that at certain times when water was running through defendants' tail-race there was none running over or through the dam and none flowing past the plaintiff's lots, and that the water was not returned to the stream in time to reach that part of plaintiff's lot which it would otherwise touch.

H. B. Turner, B. F. Lee, W. H. L. Lee, for applt.

H. H. Hustis, for respts.

Held, That the evidence raised an issue which the plaintiff was entitled to have decided by the jury unless there was some other defense to the action.

Defendants also set up as a de-

fense an equitable estoppel based upon the following facts: defendants built a tail race and their factory upon their own lands. Their factory was to be supplied with water from the stream carried through the mill-race. One S. then owned plaintiff's lots. She saw defendants and their men upon their mill-race and the factory, and understood that the race was being built to take water from the stream. S. never objected to the race in any way or authorized any one to object to it for her, nor did she at the time object to the defendants carrying the water down the race.

Held, That the facts are not sufficient to authorize the presumption of a grant or even of a license. 21 N. Y., 241. And the defendants must rest their defense upon an estoppel pure and simple.

Also held, That S. was not bound to interfere and protest. She had the legal right to acquiesce in the actions of the defendants so far as to refrain from interference, and her simple knowledge that the defendants were thus engaged did not require her to object under penalty of the loss of her legal rights.

Town v. Needham, 3 Paige, 545; *Thompson v. Blanchard*, 4 N. Y., 303; *Brown v. Bowen*, 30 id., 519; *Corning v. Troy I. & N. Factory*, 40 id., 191; *Trenton B'kg. Co. v. Duncan*, 86 id., 421; *Ramsden v. Dyson*, L. R., 1 H. L. C., 129, distinguished.

To constitute an estoppel, the person sought to be estopped must do some act or make some admis-

sion with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he now proposes to make. The other party also must have acted upon the strength of such admission or conduct. 30 N. Y., 541. In cases of silence there must be not only the right but the duty to speak before a failure so to do can estop the owner. 82 N. Y., 32.

Judgment of General Term, affirming judgment dismissing complaint, reversed, and new trial granted.

Opinion by *Peckham, J.* All concur.

HIGHWAYS. NEGLIGENCE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

Richard Farman, *respt.*, v. The
Town of Ellington, *applt.*

Decided Oct., 1887.

A complaint against a town for damages occasioned by a defective highway, so far as it alleges negligence of the town, its agents and assistants, fails to allege a cause of action. No duty rests upon a town to maintain the highways within its limits; the statute confers upon them no power or duty in respect to defective highways, but the supervision remains with the commissioners, and it is their negligence which gives a right of action. Ordinarily when the commissioner has been advised of the defective condition of a highway, the reparation of which is within the means at the command of the overseer, having given the direction to the latter to repair it, he may for the time rely upon the performance by him of such duty, yet he should be required

to use diligence to learn whether the overseer has proceeded with the work, and if he has not, to use the means provided to enforce the execution of his direction.

As it does not appear that the commissioner took any means to ascertain whether his communication to the overseer reached him or not, or whether or not any steps had been taken to repair the road prior to the accident, under the circumstances of this case there was sufficient evidence to send the case to the jury, and it is not important whether the question of negligence did or did not depend upon evidence given after plaintiff had rested and the motion for a nonsuit had been denied.

A charge by the court that it did not wish to be understood that it was the duty of the commissioner to look further after direction to the overseer, but it was a question for the jury to determine whether or not he had discharged his whole duty under the circumstances, and that if such directions were communicated to the overseer it was his duty to repair, and his neglect to do it not coming to the knowledge of the commissioner does not impute negligence to the latter, was as favorable to defendant as it was entitled to.

Appeal by defendant from judgment entered on verdict and from order denying new trial on a case and exceptions.

Action to recover damages for personal injuries to plaintiff, and for injury to his horse and carriage, occasioned by the defective condition of the highway on which he was driving the evening of December 5, 1885. It was what was commonly known as the dugway road, and a portion of its supporting bank had been washed out by the action of the water of a creek at the foot of a hill, causing the impairment at the place where the wheel of plaintiff's carriage went off, taking him and his horse and

carriage into the creek. This defect in the roadway was produced Aug. 23, and was not repaired until Sept. 7, 1885. Plaintiff had a verdict on which judgment was entered.

Wm. H. Henderson, for applt.

A. C. Wade, for respt.

Held, That the complaint so far as it alleges negligence of the town, its agents and assistants, fails to allege a cause of action, because no duty rests upon the town to maintain the highways within its limits. The statute which creates liability of towns for injuries resulting from defective highways confers upon them no power or duty in that respect, but the supervision remains as before with the commissioners of highways, and it is their negligence which gives the right of action against their respective towns. Laws of 1881, Chap. 700; 40 Hun, 190.

That by the system provided by the statutes for the ordinary repairs of highways, exclusive of bridges over intersecting streams, the work is to be furnished through the action of the overseers, who are officers. They are to warn out the inhabitants of their districts to do the work, and they are also to expend for the same purpose moneys derived by them from commutations and fines. It is through those means that the commissioner may by his direction cause such repairs to be made, and for failure to perform any of the duties required of them by the statute, or which may be enjoined upon them by the commissioners

of highways, the overseers are subjected to a penalty. This duty to make repairs does not depend upon the direction of the commissioners to do it; the statute charges them with it, 11 Wend., 667, but this does not relieve the commissioners from the duty of seeing that the roads are kept in suitable repair, and for that purpose to give the required direction to the overseers to use the means provided by the statute to supply the work necessary to do it and to use reasonable diligence to see that his directions are executed, because upon him rests the care and supervision of the highways, and his negligence alone furnishes the remedy to those suffering injuries occasioned by their defective condition. 17 Johns., 437. At all events, that is so for the purposes of actions under the act of 1881. The question whether he is chargeable with negligence must depend upon the circumstances of each case.

That ordinarily it would seem that when the commissioner has been advised of a defective condition of a highway, the reparation of which is within the means at the command of the overseer, and has given the latter directions to repair it, the commissioner may for the time being rely upon the performance by him of such duty, because it is through such direction and its execution that the work is to be done, and it cannot be supposed that the commissioner will constantly be in attendance during its progress. 27 Barb., 621. Yet in view of the superintending care imposed upon him he should be

required to use diligence to learn whether the overseer has proceeded with the performance of the work, and if he has not, to take measures, so far as he may, to enforce the execution of such direction.

The evidence to the effect that the direction from the commissioner to fix the road was communicated to the overseer is contradicted by the latter, who says he first learned of its defective condition when he saw it on Sept. 3. And it does not appear that the commissioner took any means to ascertain whether his communication reached the overseer, or whether or not any steps had been taken to repair the road prior to the accident.

Held, That the evidence was sufficient to send the case to the jury upon the question of negligence of the commissioner of highways. And it is not important whether that did or not depend upon the evidence given after plaintiff rested and the motion for nonsuit was denied, as in either event the exception will be deemed ineffectual. 83 N. Y., 7.

The court was requested to charge the jury that if they found that the commissioner sent directions by the person named to the overseer to repair the road and that they were communicated to him the commissioner's duty was discharged, which was refused and exception was taken by defendant. The court then charged that it did not wish to be understood that it was the duty of the commissioner to look further, but it was a question for the jury to

determine whether or not he had discharged his whole duty under the circumstances; and upon further request of defendant's counsel the court also charged that if such directions were communicated to the overseer it was his duty to make the repairs, and that his neglect to do it not coming to the knowledge of the commissioner does not impute negligence to the latter.

Held, That the charge as made in that respect was as favorable to defendant as it was entitled, and there was no error in the refusal to charge as requested. The care of the highways imposed upon and assumed by the commissioner may require of him something more than mere direction to his subordinate officers, although he may have a right to assume that they will obey his mandates it is consistent with his duty that he ascertain within a reasonable time whether they have been executed. He is charged with the care and superintendence of the highways, as well as with the duty of directing their reparation. The former may not be wholly discharged by the performance of the latter. The responsibility is with him so far as it comes within the exercise of reasonable care. The overseers are subject to the directions of the commissioner in the line of duty, and to his actions for penalties for refusal or neglect to execute them.

That the evidence of conversations had by witnesses with the commissioner to which exception was taken was competent to show

his knowledge of the defective condition of the highways.

Judgment affirmed.

Opinion by *Bradley, J.; Smith, P.J., and Childs, J.*, concur.

ADJOINING OWNERS. DRAINS.

N. Y. COURT OF APPEALS.

Jeffers et al., applts., v. Jeffers, respt.

Decided Nov. 29, 1887.

In an action to restrain the discharge of surface waters through an artificial ditch it was claimed that defendant had cut through a natural ridge of ground that prevented the water from flowing that way. The court found that the waters had long flowed that way; that the drain slightly increased the natural flow, but did no substantial damage to plaintiff, and refused to find that any ridge had been cut through or any new drainage area added to the natural flow. *Held*, That the action could not be maintained.

This action was brought to restrain defendant from discharging through an artificial ditch surface waters which accumulated in a pond upon his own lands and the lands of another. The complaint alleged that a ridge of high ground runs east and west across defendant's farm, and north of the pond outlet and basin to which the new ditches ran, and it was such that all surface waters south of the barrier naturally flow to the south or remain stagnant and evaporated, and none of them flowed north toward plaintiff's farm, or could so flow except by the aid of artificial changes in the surface of the ground; that the protecting ridge or plateau was about twenty rods

south from plaintiff's line, and that the defendant cut his ditch through this ridge and thus turned upon them water which never before ran that way. The defendant denied that he had cut through such ridge or brought down upon his neighbors a new and unaccustomed drainage. The issue thus framed was the issue tried. The plaintiffs did not claim in their complaint that defendant's ditch increased the natural and usual flow over their land, but claimed damages for a diversion of waters which naturally ran elsewhere. They obtained a temporary injunction upon an affidavit which states the case exactly as does the complaint. The trial judge found that the surface waters complained of had long flowed to the north, following a natural depression of the ground, and more or less found their way through a sluice crossing the highway into a ditch across plaintiff's land; that some water from defendant's land had always flowed that way. The court refused to find that any ridge had been cut through or any new drainage area added to the natural flow. The court found that defendant's drain had slightly increased the natural flow but thereby had done plaintiffs no substantial or material damage.

De L. Stow, for applts.

C. H. Roys, for respt.

Held, That the findings of the trial court are conclusive; that no cause of action was alleged for an increase of a natural flow and if an increase existed it is sufficient that it did no damage.

The finding of the trial court states that from the pond there is a water course or channel ascending gradually through a hollow or ravine through defendant's land "which, it is expressly stated, conducted nothing but surface waters." It was claimed that this finding was erroneous, because there was no evidence of the existence of a water course upon defendant's land.

Held, That the language used in the finding was not intended to mean a water course as defined in the law. That means a living stream, with defined banks and channel, not necessarily running all the time, but fed from other and more permanent sources than mere surface water. 86 N. Y., 144.

Judgment of General Term, modifying and affirming as modified judgment for defendant, affirmed.

Opinion by *Finch, J.* All concur.

CRIMINAL LAW. LARCENY.
N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

The People, *respts.*, v. Amariah H. Bradner, *applt.*

Decided Oct., 1887.

The crime of larceny charged depended on the criminal intent for its support, and if the evidence failed to give that quality to the act of defendant in appropriating the check he was improperly convicted. If the appropriation at the time it was made was not characterized by the purpose of defendant to deprive or defraud the true owner of it, the offense was not committed.

Ordinarily the possession of negotiable

paper is *prima facie* evidence of title in the possessor, but the presumption does not necessarily arise as between a bank and its officers and managers that commercial paper left and found in the bank is the property of the bank.

If the evidence justified the conclusion that defendant knew that this check was not the property of the bank, and that his purpose was to take it and appropriate its proceeds to his own use the jury were permitted to conclude that he intended the consequences of the act, which was to deprive the true owner of the property. This is the requisite criminal intent of a person standing in respect to the property taken in the fiduciary relation of bailee, servant, agent, clerk or trustee, and this was the relation of defendant to the property taken.

Appeal from judgment of Oyer and Terminer upon conviction of defendant of the crime of grand larceny in the second degree.

The indictment contains two counts, and charges that defendant as bailee, agent, attorney or trustee, having in his possession, custody and control a check of the value of \$300, drawn on the German American Bank of Rochester for that amount and belonging to one Hartman, unlawfully, fraudulently and feloniously and with intent to deprive and defraud him of the check and its proceeds appropriated the same to his own use. The facts that the check was left by the drawer with the cashier of the bank of Dansville for collection merely; that it was taken and its proceeds appropriated by defendant to his own use; and that the drawer was by his act deprived of the proceeds of it except sixteen dollars, are not controverted. There was also evidence tending to prove that the

bank, an unchartered institution, was under the control and management of defendant; that he gave more or less personal attention to its business; that the cashier and bookkeeper were subject to and acted under his supervision and direction; that for some time previous to this occasion the bank had been pressed for funds; that actions had been commenced against defendant and his brother to foreclose mortgages and the amount required to procure a discontinuance was between \$700 and \$800; that he went to the bank and behind the counter and asked for \$300, and the bookkeeper handed or showed him this check which was lying in the till, where it was put by the cashier shortly before, when left for collection; that the bank did not have the currency to supply the demand of defendant; that he took the check, sent it to Rochester and used its proceeds to procure the discontinuance of those foreclosure actions; that no minute of the transaction was made at the time on the books of the bank; the defendant swore that he did not know that the check was left for collection but supposed it belonged to the bank. It was contended that the evidence was not sufficient to justify the conclusion that defendant knew that the check was the property of Hartman, or that it did not belong to the bank where he obtained it, and therefore that the intent was not proved to deprive or defraud the owner of his property within the meaning of the statute, Penal Code § 582.

James Wood and L. N. Bangs, for applt.

George Daggett, dist. atty., and *Ralph T. Wood*, for respts.

Held, That the crime charged depended on the criminal intent for its support, and if the evidence failed to give that quality to the act of defendant he was improperly convicted. If the appropriation at the time it was made was not characterized by the purpose of defendant to deprive or defraud the owner of the property in question the offense was not committed. It cannot rest upon his knowledge subsequently obtained or upon his design, formed after the act, not to reimburse the owner or to pay him the amount of the check, 39 N. Y., 259, but subsequent conduct may to a greater or less extent go to characterize his motive or intent in the performance of the act; and after a careful examination of all the evidence as it is presented to us, we think that the evidence required the trial court to submit the case to the jury on its merits; and that the evidence permitted the conclusion that the charge in the indictment was supported by it.

That this check was taken and carried away without so far as appears any note being made of the transaction and without any direction to make any, and as defendant says to be returned if not paid by the Rochester bank, permitted the inference that the treatment of the check was as if it was there for collection, and for that purpose it was legitimate for

defendant as the *quasi* officer of the bank to take it for collection, and present it for payment for the benefit of the owner. It is true that ordinarily the possession of negotiable paper is *prima facie* evidence of title in the possessor, and such would be the presumption as between a bank and its patrons or customers, but the fact must be recognized that the legitimate business of banks is the collection from or through other banks of bills and notes. As between the bank and its officers and managers the presumption does not necessarily arise that commercial paper left at and found in it is the property of the bank. The fact therefore of the relation referred to of defendant to the bank and its business is quite an important one, and its absence from the case would deprive the prosecution of an essential support.

That the criminal intent must be established by the evidence, but if the evidence justified the conclusion (which it did on this case) that defendant knew that this check was not the property of the bank and that his purpose was to take it and appropriate the proceeds to his own use, the jury were permitted to conclude that he intended the consequences of the act, and that it was to deprive the true owner of the property, which is the requisite criminal intent of a person having, in respect to the property taken, the fiduciary relation of bailee, servant, agent, clerk or trustee. Penal Code, § 528. The taking of the

check for collection was within the line of the business of the cashier as such of the bank, and by virtue of such relation, and it cannot as a matter of law be said that the check was not through the cashier received by the bank for collection and that the duty and relation of defendant in respect to it was not of such fiduciary character.

The court was requested to charge and declined, "that the people have the affirmative of this issue and must prove beyond a reasonable doubt that defendant knew that the check belonged to Hartman and not to the bank," and defendant's counsel excepted. The court had charged the jury that there is no evidence that defendant had any knowledge of the arrangement between the cashier and Hartman, and asks the question whether defendant knew what it was? And says "you are to consider whether the people have established beyond a reasonable doubt that defendant intended to deprive Hartman of his check or defraud him of it, and that the other elements of the crime of larceny are made out. If you find that he had not any intent to defraud Hartman or to deprive him of his property your verdict must be not guilty."

Held, That the charge as made seems to have embraced all that was essential in respect to whether the check and its proceeds were appropriated by defendant with the intent to defraud Hartman of his property, and included, so far as it was required to do so, the

subject of knowledge that the check belonged to the latter. 103 N. Y., 587. But was it essential to the offense that defendant should have actual knowledge that the check belonged to Hartman? An element to constitute the crime of larceny was knowledge that it did not belong to the bank, and an intent to deprive the true owner of it; and we think such intent may be applicable to the consequences to the owner and the crime accomplished although the name of the owner is not at the time actually known to the party charged with the offense. That seems to bring the crime charged within the meaning of the statute, which otherwise might be easily evaded.

Judgment affirmed.

Opinion by *Bradley, J.*; *Haight* and *Corlett, JJ.*, concur.

WILL. ATTORNEY'S LIEN.

N. Y. COURT OF APPEALS.

Sloane, respt., v. *Stevens, applt.*

Decided Oct. 11, 1887.

An attorney's will contained a clause releasing all claims he might have against any person named in the will. By his codicil he gave to defendant certain books and papers relating to a suit on which he had a lien for services. Defendant was not named in the will, nor released by the codicil. *Held*, The naked surrender of his lien on defendant's books showed a purpose to retain the debt and that defendant was not released therefrom.

This action was brought to recover for professional services rendered by the late Charles O'Connor as counsel and legal adviser of the

defendant. It appeared that Mr. O'Connor died leaving a will; that most of the services in suit were rendered before said will was made, but at the time of his death the testator held in his hands certain papers relating to the litigation upon which he had a lien for his services. The will contained this clause. "I hereby release all claims or demands which I may have at my death against any person or persons named in this will." At the close of his will the testator formally revoked all previous "wills and codicils." Fifteen months later and about two weeks before his death, he executed a codicil in which released two debtors who were specified among those released in his will and one who is not specified. The defendant was not specified among the debtors released in the will or the codicil, but immediately following the clause in the codicil releasing the debtors are these words: All books, papers, duplicates, etc., having any relation to the Tennessee bondholders' claim, I give to my faithful and honorable friend C. Amory Stevens (the defendant), to use in his discretion." The codicil begins with these words: "This is Charles O'Connor's first codicil to his last will and testament. This instrument made and signed April 28, 1884."

John C. F. Gardner, for applt.

Albert G. McDonald, for respt.

Held, That as the testator manifested an intent that the will should be distinguished from the codicil, the will speaks from its own date and not from the death

of the testator, 2 Vesey Sr. 243; 19 L. J., N. S., 63; 53 N. Y., 595; 52 id., 450; that the release of persons "named in this will" did not include those named in the codicil; that the naked surrender by the testator of his lien on the defendant's books, etc., carried an implication of the purpose on his part to retain the debt.

Judgment of General Term, overruling demurrer, affirmed.

Opinion by *Finch, J.* All concur, except *Rapallo, J.*, not voting.

NEGLIGENCE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Niles Case, *respt.*, v. Frank Drew, *applt.*

Decided Oct., 1887.

In an action for damages caused by negligence resulting from a collision of vessels, it is competent to prove that there were means and facilities known to those running vessels which were usual, and and which would enable the jury to find furnished a greater degree of safety to the vessel injured than the means used. Where the specific objection to a question is that the foundation had not been laid for the question, and the attention of the court is not called to the competency of the inquiry in the form it is put to the witness, the question of competency is not available upon appeal.

A mariner as a witness may give his opinion based upon his knowledge obtained by observation of the distance a described light might be seen in a given position by a person in another given position, when free from obstruction, but the value of the opinion when given is for the jury to determine.

An almanac as such is not evidence of the time the moon rose on a given day; yet the court will take judicial notice of the

time the moon rose on the different days of the year as of all other events in the constant and immovable course of nature, and it may be assumed that the court in admitting the almanac as evidence of the time the moon rose treated it as correctly stating the time on the day in question, and admitted it for the purpose of refreshing the memory of the jury, and in such view it is competent.

While the omission of plaintiff to have on his boat the light prescribed by the ordinance of the city of Buffalo was a fact for the consideration of the jury on the question of the plaintiff's negligence it did not necessarily establish that fact for the purpose of a defense.

Appeal by defendant from judgment of County Court entered on a verdict.

Action to recover damages alleged to have been sustained by the injury to plaintiff's canal boat occasioned by the negligence of defendant in running his steam barge into it, in Buffalo harbor, on Oct. 2, 1881, for which plaintiff recovered \$500. On the night in question plaintiff's canal boat "Victor" was moored in the harbor at Buffalo in Peck's slip. Entering from Buffalo river to the slip is the canal known as Black-wess canal. Defendant's propeller "Lyon" came up the river and in turning into the slip the propeller struck plaintiff's canal boat and did the injury complained of. Evidence was given on the subject of defendant's negligence, and plaintiff's contributory negligence. It appeared that defendant's vessel was proceeding slowly to make the turn into the slip and the bow of it extended so far toward the dock that it struck plaintiff's boat lying there outside and almost abreast of two other canal boats.

On the part of plaintiff evidence was offered and given on the subject of the use of a tug to take a vessel into and through the slip, to which exceptions were taken by defendant.

Williams & Potter, for applt.

J. W. Humphrey, for respt.

Held, That there was no error in these rulings. It was competent to prove that there were means and facilities known to those running vessels in the harbor which were usual, and which would enable the jury to find furnished a greater degree of safety and protection to boats lying in the slip than would attend the omission to adopt such precautionary measures, and as bearing upon the question whether it was negligence on the part of defendant to proceed without availing himself of accessible means of placing the movements of his vessel more effectually under control.

A witness was asked whether there was any difficulty in running a propeller of the size of the "Lyon" headed up the creek, when properly handled either with lines or tug, into the slip there and avoiding collision with one of the three canal boats lying abreast where those did, and was permitted to answer that he thought not.

This was taken subject to the objection and exception of defendant.

Held, The witness was an experienced mariner and familiar with the harbor, yet the question of the competency of this inquiry in the form it was put to the witness is not free from doubt, as it may be said the subject involved was mat-

ter for the conclusion of the jury rather than for the opinion of the witness; but in view of the fact that the attention of the court was not called to that particular objection by the ground upon which it was made we think it is not available to defendant. 57 N. Y., 651; 81 id., 242; 63 Barb., 261-S. The specific objection was that the foundation had not been laid.

There was evidence on the part of plaintiff that there was a lighted lamp at the window and inside of the cabin of his canal boat so situated that it may have been seen from a vessel going up the river and before reaching the slip; that it gave a good, bright light; that there was nothing in the way, and that it might have been seen a quarter of a mile on the river below the place where the boat lay. After this evidence had been given without objection, another witness was asked how far a bright light of a lamp at the window of the cabin of plaintiff's boat could be seen by a person on the pilot house of the "Lyon" coming up the river; to which objection was made that it was incompetent and immaterial, and not a matter for expert testimony. The witness answered about 450 to 500 feet.

Held, The evidence is of a fact derived from observation, and the conditions being the same in all respects the distance which the light could be seen would be uniform, as its effect is dependent upon natural causes only. We assume that the statement made by the witness of the distance the light could be seen was based upon

his knowledge obtained from his observation as a mariner, and as such was competent for the same reasons that a person who has given attention to the movement of railroad trains may give his opinion of their speed on occasions when he has observed their progress. Without the aid of such evidence the jury might not have the means of intelligently considering the fact; but the value, when given, of the opinion is always for the jury to determine. The objection did not go to the competency of the witness, but to the character of the evidence only.

This case is distinguished from the case of *McKechnie v. Standish*, 6 W. Dig., 433. In that case the witness was asked to give an opinion based on his knowledge as an astronomer only, merely by the application of science.

The time of the collision was about midnight. Plaintiff offered and put in evidence that portion of Dr. Jayne's almanac which purported to show the time of the rising of the moon on the 2d day of Oct., 1881, to which objection and exception were taken.

Held, That the almanac was not competent evidence as such to prove when the moon rose on that or any day, but if the statement in that respect was correct defendant could not have been prejudiced by it. Judicial notice will be taken of the time the moon rises and sets on the several days of the year as well as of the succession of the seasons, the difference of time in different longitudes, and the constant and immovable course of

nature. It may be assumed that the court, treating the almanac as correctly stating the time when the moon rose on the day in question, received it in evidence to refresh the memory of the jury on the subject; and in that view we think it was competent. 47 Conn., 179; 55 Md., 11; 39 A. m., 414.

That the court properly disposed of the motion to nonsuit plaintiff on the ground of the omission of plaintiff to have on his boat the light required by the city ordinance; for while this omission was a fact for the consideration of the jury on the question of plaintiff's negligence, it did not necessarily establish that fact for the purpose of this defense.

Judgment affirmed.

Opinion by *Bradley, J.; Smith, P.J.*, and *Barker, J.*, concur.

BILL OF PARTICULARS. SLANDER.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

Simon Goldsmith, *respt.*, v. Charles Glatz, *applt.*

Decided Oct. 26, 1887.

In an action to recover damages for false representations made by plaintiff concerning plaintiff where the complaint charges that such representations were made to an association and plaintiff was thereby prevented from obtaining employment defendant is entitled to a bill of particulars, stating the time and place and the persons to whom the representations were made and the persons who were thereby induced to refuse employment to plaintiff.

Appeal from order denying motion for a bill of particulars.

Action on an express promise to pay a sum of money to plaintiff. The complaint alleged that plaintiff was in the employ of defendant, who was a member of the national association of jobbers in American watches, one of whose by-laws provided that its members would not employ any salesman who had been dismissed by any jobber for a violation of its by-laws; that defendant falsely represented to said association that plaintiff had sold goods to customers in violation of instructions and dismissed plaintiff, thereby preventing him from obtaining employment; that he made a charge against defendant for the loss and damage caused thereby, and that defendant to compromise said claim made the promise in suit.

The answer alleged no consideration; that the claim had no foundation and denied that he made the promise in compromise of said claim.

Defendant moved for a bill of particulars of the time when, place where and persons to whom plaintiff expected to prove the representations were made, and the names of the persons he intended to prove were induced by said representations not to employ him. The motion was denied.

A. Gilhooly, for applt.

C. H. Machin, for respt.

Held, Error. The allegations in this case are of the most general character, and as a consequence thereof defendant is utterly in ignorance as to the particular facts which plaintiff may prove on the trial. In order that defendant

may properly prepare for trial it is necessary that he should know the times when, the places where and the names of the persons to whom the alleged words were spoken. It is also necessary that he should know the names of the persons who by reason of such alleged representations were induced to refuse plaintiff employment.

Order reversed, with costs, and motion granted.

Opinion *per curiam*.

FALSE REPRESENTATIONS. DAMAGES.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

George H. Cross, *respt.*, v. John H. Divine, *applt.*

Decided Nov., 1887.

Where defendant sold premises to plaintiff upon which there was a valid mortgage, of which fact plaintiff was ignorant, *Held*, That the latter could maintain an action for false representations in the sale. The measure of damages would be the amount of the mortgage and interest.

Action to recover damages for fraudulent representations in the sale of real estate. In April, 1878, plaintiff purchased certain real estate of defendant who represented the property to be clear. The price was \$800. In fact there was a mortgage upon it for \$250. Up to 1882 defendant paid the mortgage and interest. In 1886 plaintiff first became aware of its existence, when it was presented to him for payment. Plaintiff recovered judgment.

T. A. Read, for applt.

W. W. Smith, for respt.

Held, That the recovery was right. In *Krum v. Beach*, 96 N. Y., 398, it is said that such an action may be maintained whether the representations be as to the title or as to matters collateral; the measure of damages is full indemnity, and that is the difference between the value of the thing sold and what it should be according to the representations. Property covered by a mortgage is worth less by the amount of the mortgage except in the case where the mortgage exceeded the value of the land. Of this latter condition there is no proof. There was no error in refusing to allow defendant to prove that he was well off and doing a large business when he sold the premises.

Judgment affirmed.

Opinion by *Learned, P.J.*; *Williams, J.*, concurs.

FRAUD. TRUSTS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Mariah C. Hubbard, respt., v. Aurelius S. Sharp, exr., et al., appls.

Decided Nov., 1887.

A parol agreement of the grantor upon a conveyance of land that he will hold the same for the benefit of the grantor and reconvey upon request is void under 2 R. S., 135, § 6; and in the absence of fraud the grantor is without relief.

Appeal from judgment for plaintiff on a report of a referee.

Plaintiff on Feb. 23, 1876, owned a house and lot which she then conveyed to E. M. Sparks who on the same day conveyed to G. A. Hubbard. He on Nov. 3, 1876,

conveyed to S. E. Calkins who Oct. 7, 1880, conveyed to H. M. Bullard and she on Feb. 11, 1882, conveyed to Fida C. Sharp. She was the wife of the defendant Sharp. She died April 7, 1885, and left a will appointing her husband executor with power of sale and leaving her property in trust for him and for her son to be divided equally between them when the son reached majority. There was no consideration for any of the conveyances. They were made, as plaintiff claims, to defraud creditors and as defendant claims for family reasons. Their purpose was that the grantee in each case should hold the property for plaintiff's benefit. There was no written declaration of trust. No fraud is shown. The deed was made on plaintiff's request. No grantee ever paid any thing except that H. M. Bullard paid off a mortgage of \$1,750, and when she deeded to Fida C. Sharp the latter gave her a bond and mortgage on the premises for the same amount, which is unpaid. Fida C. Sharp accounted to plaintiff for the rents and her husband has made some payments thereon. The referee found that Fida C. Sharp took the title under an agreement to hold the same for plaintiff's benefit and to convey the same to her upon request. This agreement was by parol.

Frank S. Black, for applt.

John Cadman and *N.A. Calkins*, for respt.

Held, The parol agreement was void. 2 R. S., 135, § 6. The declaration of trust must be in writ-

ing subscribed by the party declaring the same. 44 N. Y., 156; 66 id., 227; 45 id., 589; 20 id., 39; 98 id., 56; 14 Hun, 280. No fraud is shown or alleged. Plaintiff acted of her own free will and nothing was omitted from the deeds which she wished inserted.

Judgment reversed.

Opinion by *Landon, J.*; *Learned, P. J.*, and *Williams, J.*, concur.

DEPOSITIONS.

N. Y. SUPREME COURT. GENERAL TERM. FIRST DEPT.

John F. Carr, *respt.*, v. John G. Risher, *applt.*

Decided Oct. 26, 1887.

In an action to enforce the liability of a trustee of a corporation for failure to file a report where the cause of action arose many years before the commencement of the action and all the parties from whom defendant could procure information are dead, he may be allowed to examine the plaintiff before trial as to the manner in which he became the owner of the claim on which the action is founded.

Appeal from order vacating order for examination of plaintiff.

Action to recover the value of certain bonds of a corporation which plaintiff claimed to have purchased before maturity, and which he claims to collect of defendant, who was a trustee of said corporation, on the ground of failure to file the annual report in 1867. The bonds were issued to one W. in 1865 and were due in 1868. This action was commenced in 1886. Defense, the statute of limitations of this State and Pennsylvania.

On an affidavit showing that the cause of action accrued nearly twenty years ago; that all the

trustees of the company, except one who lives in Chicago, are dead; that the books of the company are lost; that the company was wound up in 1870 and the bonds agreed to be canceled and the property delivered to the vendors; that at least ten of the bonds in suit were probably never negotiated; and that plaintiff's testimony was material and necessary to enable defendant to prepare for trial, defendant obtained an order to examine plaintiff. The order was subsequently vacated.

E. P. Wheeler, for *applt.*

J. H. V. Arnold, for *respt.*

Held, Error. The claim in this action being stale, having arisen more than twenty years prior to the commencement of the action, and all the parties being dead from whom defendant might procure the necessary information to enable him to prepare for trial, it is proper that he should be allowed to examine plaintiff on the subject of the manner in which he became the owner of the bonds which formed the foundation of the cause of action mentioned in the complaint and of the *bona fides* of such ownership. Such an examination would not be, in view of the peculiar circumstances of the case, a fishing examination, but would only furnish defendant with information of facts which it would be impossible for him to establish in any other way. To this extent defendant should have been allowed to examine plaintiff as a witness before trial.

Order reversed and order entered allowing examination.

Opinion *per curiam*.

CONTRACT. DEED.

N. Y. COURT OF APPEALS.

Hodge, exr., et al., *appls.*, v. Sloan, *respt.*

Decided Oct. 28, 1887.

One N. owned land containing deposits of building sand, the sale of which constituted his business. He sold a part of the land to S. by deed containing a covenant that S. would not sell any sand from the land. *Held*, That the covenant was good between the parties and bound in equity whoever took the title with notice of such covenant, although not contained in the subsequent deeds, and that an action would lie to restrain such sale.

This action was brought to restrain defendant from selling sand taken from lands which had been conveyed by N., plaintiff's testator. It appeared that N. in May, 1868, owned about forty acres of land which contained deposits of building sand, the sale of which constituted his only business. S., defendant's grantor, applied to purchase about a half acre, but N. declined to sell, on the ground that by such sale he would be injuring his business. S. agreed to make the purchase, stipulating not to sell any sand from said half acre, and N. executed a written contract of sale, which contained a covenant to that effect. N. conveyed the land to S. by a warranty deed, which contained a covenant that S. would not sell any sand from the land. S. subsequently conveyed the said land to his son, the defendant, the deed containing no exception, reservation or condition, and no reference to the covenant in the deed from N. The defendant, before and at the time of taking his deed, had

full knowledge of such covenant and that it was contained in the deed to his grantor. He entered upon the premises conveyed to him and sold sand therefrom, and upon being remonstrated with by N. declared that he would continue to sell sand notwithstanding the covenant in the deed to his grantor.

D. S. Morrel, for *appls.*H. L. Huston, for *respt.*

Held, That this action could be maintained.

A covenant in restraint of trade is valid if it imposes no restriction upon one party which is not beneficial to the other and was induced by a consideration which made it reasonable for the parties to enter into it, or if it was a proper and useful contract, or such as could not be disregarded without injury to a fair contractor. 21 Wend., 157; 1 P. Williams, 181; 106 N. Y., 473.

Also held, That the contract between N. and defendant's grantor was good between them, and it should in equity bind whoever takes title with notice of such covenant; it is not necessary that the covenant should be one technically attaching to and concerning the land and so running with the title; it is enough that the purchaser had notice of it. 11 Beav., 571; 2 Phillips, 774; 26 N. Y., 105; 70 id., 440; L. R., 9 Eq. C., 678; 6 Allen, 344; 48 N. H., 475; L. R., 6 Eq. C. 252; 1 H. & Q. Ch. R., 105; L. R., 2 Q. B. Div., 409; L. R., 2 Ch. Div., 576.

Brewer v. Marshall, 4 C. E. Green. N. J., Eq., 537, distinguished.

Judgment of General Term, affirming judgment for defendant, reversed, and new trial granted.

Opinion by *Danforth, J.* All concur, except *Peckham, J.*, not voting, and *Andrews* and *Earl, JJ.*, dissenting on the ground that the covenant was a personal one.

MARRIAGE. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Nellie B. Wilcox, respt., v. Fred P. Wilcox et al., appls.

Decided Oct., 1887.

To constitute matrimonial cohabitation, the manner in which the parties are living together must be such as to fairly represent such relation, but the fact that the man kept rooms in his own house which he occupied a portion of the time, and away from the residence of the woman is a circumstance bearing upon the situation, but not necessarily inconsistent with matrimonial cohabitation.

The fact when found of a contract and formal ceremony attending it is significant of the then purpose of the man and woman to assume the relation of husband wife to each other and goes to characterize their association following it as lawful and marital if it takes the character of cohabitation, and may not in the judgment of the jury require so much by the way of appearances, reputation and publicity as would be deemed necessary to produce the inference of a contract of marriage when no other evidence of it than cohabitation is made to appear.

When a marriage is void by the laws of the place where celebrated, when entered into between citizens of our country when celebrated according to the laws of their domicile, while in another country, such marriage may be treated as contract to marry *per verba de presenti* and treated as valid when followed by cohabitation, by reason of such cohabitation.

Photographs, shown to be likenesses of the person they purport to represent may be

shown witnesses, for the purpose of identifying the person whose likeness they may purport to be, although not taken from the original negative.

A judgment record of another State where it does not appear that the court had jurisdiction over the defendant is not an adjudication for any purpose, and the plaintiff in such proceeding is not concluded thereby.

The presumption of innocence and freedom from purposes and conduct immoral applies in civil as well as in criminal cases, and satisfactory evidence is required to establish the contrary; and when in the judgment of the jury the evidence is *in equilibrio* the imputation is not established.

Appeal from judgment entered upon verdict and from order denying motion for new trial.

Plaintiff alleges that she is the widow of Otis H. Wilcox, deceased, and brings this action for dower in certain premises of which he died seized. Defendant Wilcox is his heir and devisee, and with the other defendants in the possession of the premises. The question presented and litigated at the trial was whether plaintiff became the wife of Otis N. Wilcox or not and was his widow. She was married to Edward Blackford in 1866 and they lived together in the city of Rochester until the year 1876, when he left and has not since returned, and there was evidence tending to prove that he so went away in April, 1876, and that she has not since known him to be alive. There is also some evidence to the effect that as early as 1877 relations friendly and somewhat intimate existed between her and Wilcox, who was a widower, also residing in the city of Rochester, and that such relations continued

thereafter. He died on July 5, 1883. Her place of residence was on East avenue where she resided until the spring of 1881, when she rented a house on Monroe avenue opposite to that of Wilcox, and continued to reside there except a portion of the time, when she was in Cleveland, Ohio, until the spring of 1882, when she returned to her residence on East avenue. In the spring of 1881 they went together to Montreal, and it is contended on the part of plaintiff that a ceremonial marriage between them was had on board of the steamship Toronto, then lying at the wharf at that port. In support of that, the evidence of the captain, steward and second engineer of the ship is produced to the effect that on July 25 three persons, two men and a woman, came on board the vessel, and by permission of the captain and his direction to the steward were shown through it; that one of the persons had the dress and appearance of a clergyman of the Church of England, and when in the saloon of the ship the gentleman of the clerical appearance performed a marriage ceremony by which this other gentleman and the lady were apparently married; that although the steward and second engineer were not in the saloon at the time, they were at the entrance and saw what occurred, and heard a portion of the service; that the person of clerical appearance had what appeared to be a pocket prayer book from which he read; that the other two persons who stood in front of him

were respectively asked if they would take the other for husband and wife and answered in the affirmative, and the man placed a ring on the finger of the lady. These two witnesses testify that plaintiff was the woman, and on being shown the photograph of Wilcox, that they recognized that as the portrait of the man to whom she was married on that occasion. The persons were all strangers, and they had no means of knowledge that the person was a clergyman further than his appearance and dress.

Theodore Bacon, for applt.

Quincy Van Voorhis, for respt.

Held, That such marriage was void by the laws of Lower Canada where the marriage ceremony was performed, because plaintiff had already been previously married to another, who does not by the evidence appear to have been not then living. But assuming that plaintiff then had not for five years known him to be living she could contract a marriage lawful in this State, and it would remain valid until its nullity should be judicially declared. 2 R. S., 139, § 6. *As a rule the law of the place where the marriage is celebrated governs, and if lawful there is valid everywhere, and if void there is void everywhere, but that rule has its qualifications and perhaps exceptions, which go to support a marriage contract and relation in so far, that as between citizens of one country while in another a marriage may be celebrated according to the laws of the domicile, although not celebrated

in the manner required by the law of the place where celebrated, and may be treated as a contract to marry *per verba de presenti* and treated as valid when followed by cohabitation, and by reason of such cohabitation.

Hence in view of the domiciliary relation to the parties to this State this agreement made in Canada to take each other as husband and wife might characterize it as concubial, cohabitation in good faith following it and with it effectual to constitute the marriage relation. Substantially those propositions were submitted to the jury and by them found in the affirmative, and the evidence permitted their finding.

That while there does not appear to have been any public announcement that they had been married or had assumed such relations, Wilcox retained rooms in his own house, though there was evidence that he was frequently and at times daily at the house where plaintiff with her children resided, and spent considerable time and especially evenings there, sat at the head of her table and waited on the company and was much at home, but whether he did or did not usually or occasionally stay at plaintiff's house during the night does not appear, but there is evidence that on one occasion in the evening he went into her bedroom, and some evidence of circumstances tending to prove intimacy between them morally consistent only with marital relations. There was also evidence of declarations made by her after her

return from Montreal, denying her marriage, which were contradicted by her, then her letters written him from Cleveland, Ohio, and the manner she addressed them to him and signed them do not appear very demonstrative of the matrimonial relation, nor did her omission to announce such relation in support of her attempt and right to visit him the last days of his life at the hospital. But the jury may have found reasons for these things, or deemed them subordinate to other and controlling considerations. It was their province and right to measure the credibility of witnesses and weigh the force of the evidence so far as it was in conflict. The evidence was sufficient to submit the question to the jury.

That the general definition of "matrimonial cohabitation" is the living together of a man and woman ordinarily as husband and wife. 1 Bish., § 777; 75 Penn. St., 207; 71 N. Y., 137. This does not ordinarily require an announcement further than is given by the appearances of the purpose of the parties. There must be sufficient to fairly represent such relation by the manner in which the parties are living together. The fact that Wilcox kept rooms in his own house which he occupied a portion of the time at least is a circumstance bearing upon the question of cohabitation, but is not necessarily inconsistent with it. 88 N. Y., 546. The fact when found of the contract entered into and formal ceremony attending it as testified to by the witnesses is

significant of the then purpose of plaintiff and Wilcox to assume the relation of husband and wife to each other, and goes to characterize their association following it as lawful and marital if it takes the character of cohabitation, and may not in the judgment of the jury require so much by way of its reputation and publicity as would be deemed necessary to produce the inference of a contract of marriage when no other evidence of it other than cohabitation is made to appear.

The photographs were not original ones taken from the negative, but were copies taken by a photographer from the original. They were recognized by witnesses well acquainted with Wilcox in his lifetime as likenesses or portraits of him.

Held, That it was competent to permit them to refer to the photographs and testify whether or not they saw in them the likeness of the person they saw there. The fact that they were taken from the originals, and therefore copies only, may not and it seems did not materially impair their representation of the appearance and likeness of Wilcox. 82 N. Y., 50.

In the fall of 1881 plaintiff commenced an action or proceeding in the Court of Common Pleas of Cuyahoga County in the State of Ohio against her husband, Edward Blackford, for a divorce which resulted in a decree to that effect Jan. 21, 1882. And in an affidavit made by her in that proceeding it is stated "that she has not been able to learn his whereabouts or

residence and only learned that he was in the city of Philadelphia, Penn., in the fall of 1876." That was within five years of the Montreal marriage ceremony. She had testified on the trial that he had absented himself in April, 1876, and had not since been heard of by her. After the judgment roll was put in evidence she further testified that she did not make the statement in the affidavit, and did not know that it was in the affidavit; to this evidence exception was taken and it is contended this was error, also that the judgment record was conclusive evidence that plaintiff remained the wife of Blackford until the time of the entry of the decree of divorce.

Held, That the record did not conclude her in respect to the fact stated in the affidavit, nor does the record, so far as appears, have the effect of an adjudication for any purpose. Blackford was not served personally nor did he appear in the proceeding, and there is no evidence he was ever in the State of Ohio. 76 N. Y., 78; 101 id., 23.

Several letters of plaintiff to Wilcox commencing in 1880 and the spring of 1881 while she was in Cleveland were put in evidence from which the defense claimed that the relation between them was not matrimonial but meretricious in its purpose and effect. Upon that subject the court charged the jury that "if these letters can reasonably bear the interpretation of innocence, can fairly bear the interpretation of an

affectionate disposition existing between them and not an immoral connection it is your duty to adduce that result from them." To this charge counsel for defendant excepted.

Held, That it cannot be said that the character of the relations, whether innocent or immoral, between plaintiff and Wilcox prior and up to July, 1881, was not an important element for the consideration of the jury upon the main question of fact submitted to them for their determination as bearing upon the credibility of evidence given, and the facts which it tended to prove and the inferences derivable from it. Relations which are meretricious cannot ripen into connubial relations, but are characterized as immoral until a change of purpose is in some way manifested. The presumption of innocence and of freedom from purposes and conduct immoral applies in civil as well as criminal cases, and satisfactory evidence is required to establish the contrary; and when in the judgment of the jury the evidence is *in equilibrio* the imputation is not established. 1 Hill, 270; 71 N. Y., 187. This presumption is evidence only, and has its controlling effect as such until overcome by other evidence. When the jury can fairly and reasonably construe the evidence so as to protect a party against charges of misconduct it may be a proper thing for them to do so, but when it may in their judgment reasonably be construed the other way as well, it becomes a matter for

them alone to determine which direction they shall give to it, rather than a duty imposed by law to find the fact in a particular way. The letters referred to furnish some evidence upon the question suggested in the charge the determination of which involved the consideration of their meaning and import, and it is not clear that they would not be construed either way in that respect in view of the evidence; and being so it was for the jury to give such effect to them as in their judgment the weight of the evidence as viewed by them fairly required. It seems that this instruction and direction was an invasion of the province of the jury, which in view of the conflict of evidence upon which the findings of the main fact of the issue defended cannot be disregarded.

Judgment reversed and new trial granted, costs to abide event.

Opinion by *Bradley, J.*; *Smith, P.J.*, and *Haight, J.*, concur.

NUISANCE.

N. Y. COURT OF APPEALS.

Callanan et al., *respts.*, v. Gilman, *applt.*

Decided Nov. 29, 1887.

It is not sufficient that obstructions in a street are necessary with reference to the business of him who creates and maintains them, but they must also be reasonable with reference to the public.

The defendant, however, should not be restrained entirely from using such obstructions, but only from unnecessarily or unreasonably obstructing the passage of the public along the sidewalk.

Modifying S. C., 22 W. Dig., 198.

This action was brought to enjoin defendant from obstructing the sidewalk. It appeared that plaintiffs and defendant are extensive wholesale and retail grocers on the south side of Vesey street in New York City, and a large portion of plaintiffs' customers in reaching their store were obliged to pass in front of defendant's store. Goods were taken to and from defendant's store by means of trucks loaded in the street. The trucks were placed in the street adjoining the sidewalk and then a bridge made of two skids planked over, three feet wide and fifteen feet long, with side pieces three and one-half inches high, was placed over the sidewalk, with one end resting upon defendant's stoop, and the other upon a wooden horse outside the sidewalk near the truck to be loaded. This bridge was about one foot above the sidewalk at the inner end, and about twenty inches above at the outer end. This bridge was usually removed when not in use, but it was sometimes permitted to remain in position when not in use for ten or fifteen minutes, and when in use sometimes from one to two hours. The court found that the bridge thus remained in position from four to five hours each business day between 9 A. M. and 5 P. M., and that they obstructed the sidewalk the greater part of every business day.

John E. Parsons and Edwin M. Wright, for respts.

Henry Schmidt, for applt.

Held, That defendant was guilty of a public nuisance; that it was

incumbent upon him to show not only that the use he made of the sidewalk was necessary in his business, but also that it was reasonable in reference to the public convenience.

It is not sufficient that obstructions are necessary with reference to the business of him who creates and maintains them, but they must also be reasonable with reference to the convenience of the public. 6 East, 427; 3 Campbell, 224, 230; 1 S. & R., 217; 1 Den., 524; 101 N. Y., 254; 58 Me., 56.

Whether an obstruction in a street is necessary and reasonable must generally be a question of fact, to be determined upon the evidence relating thereto.

Defendant claimed that plaintiffs did not allege in their complaint or prove such special damages as entitled them to maintain this action.

Held, That defendant having taken issue upon the complaint and gone to trial, it must be held sufficient to warrant proof of special damages.

An injunction was granted perpetually restraining defendant, his agents, etc., from obstructing with a bridge the sidewalk in front of his premises, or from hindering or preventing the plaintiffs or their employees, etc., from having the free and unobstructed use of a passage along the sidewalk of such premises by any like obstruction.

Held, That the judgment should be so modified as to enjoin the defendant from unnecessarily or unreasonably "hindering or preventing the plaintiffs or their em-

ployees, etc., from having the convenient use of and passage along the sidewalk by any like obstruction."

Judgment of General Term, affirming judgment granting an injunction, modified, and as modified, affirmed.

Opinion by *Earl, J.* All concur.

NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Joseph Thorn, *applt.*, v. The N. Y. City Ice Co., *respt.*

Decided Nov., 1887.

Plaintiff had worked upon ice in what is called "canal" work and had had some experience in storing ice within and in drawing it out from houses. He was ordered to leave the canal and go on a stack, eight feet high. A hook was given him which was dull. He had it sharpened but it was not then satisfactory. After two hours' work with it it slipped from a cake into which plaintiff had struck it, or the cake broke, plaintiff lost his balance, fell off the stack and was injured. *Held*, That he could not recover and that it was not negligence to build the stack without any barrier which would prevent men from falling off.

Plaintiff had worked for defendant for two or three winters on what is called "canal" work, pushing cakes along a channel in the ice. He had also worked inside houses in storing ice and in drawing it out from such houses. He was directed to go and work on a stack which was then eight feet high. The paymaster of defendant gave him a hook which he said he must use until he got a better one. One of his fellow

workmen afterward told him his (plaintiff's) hook was dull and said he would not work with him unless he got it sharpened. A carpenter filed it as well as he could and said it had not been properly filed in the first place. Plaintiff worked after it was sharpened two hours and a half when the accident occurred. He struck his hook in a cake, it did not penetrate deeply and when plaintiff pulled hard upon it the hook came out of the ice, plaintiff lost his balance, fell off the stack and was hurt.

Plaintiff was non suited.

R. E. Andrews, for *applt.*

F. H. Osborn, for *respt.*

Held, That plaintiff did not make out a cause of action. The negligence of defendant is claimed to consist in not furnishing a sharper hook and also in not building some barrier around the stack which would prevent men from falling off. We think the case is within the rule of *Marsh v. Chickering*, 101 N. Y., 396. The tool furnished plaintiff was an ordinary one of which he had full knowledge and comprehension. He suspected it was dull and had it sharpened and was then able to work with it two hours. Its slipping may have come from its being dull or it may have come from the breaking of the ice into which the hook was stuck.

It does not appear that this hook was not reasonably safe and suitable. The master is not bound to furnish the best known or conceivable appliances. 98 N. Y., 562.

As to the barrier it seems that sometimes in constructing stacks pieces of wood are put between the courses; to these uprights are fastened and on these boards are nailed. The object is to protect the ice from the weather. This construction if carried above the stack would act as a barrier in a measure. But the barrier was not as high as the top of the stack and its condition was visible. The stack was not high. If there was peril plaintiff knew it and assumed it. 101 N. Y., 520.

Judgment affirmed.

Opinion by *Learned, P.J.*;
Landon and Williams, JJ., con-
cur.

RAILROADS. LEASE.

N. Y. COURT OF APPEALS.

Day et al., *respts.*, v. The O. &
L. C. RR. Co., *applt.*

Decided Oct. 11, 1887.

A railroad corporation is not dissolved by a mere failure to build its road within the time prescribed by its charter; a judicial proceeding and judgment are necessary.

Where the charters of both companies give them the power to contract and make leases, a lease of one road to the other is valid, although one may be a foreign corporation.

Under the circumstances of the case, *Held*, That the earnings of the road could be applied by its directors as in their discretion they might deem best for the company, and that the holders of its net income mortgage bonds were not entitled to priority of payment over charges for the leased road.

Plaintiffs were the owners of certain "income mortgage bonds" issued by the defendant and brought this action on behalf of

themselves and other owners of said bonds to restrain defendant from using its net earnings in paying the bonds of the L. V. Ex. RR. Co. under a lease executed by that company to the defendant and for an accounting by the defendant of moneys already devoted to that purpose. Defendant was organized under the laws of this State. By Chap. 73, Laws of 1880, it was authorized to issue the bonds in suit. In Oct., 1872, the legislature of Vermont incorporated the L. V. Ex. RR. Co. to build a railroad. The act provided that unless the corporation within ten years from the approval of the act commenced the construction of its road it should be dissolved. More than ten years elapsed after the charter was approved and no steps had been taken toward the construction of the road. An agreement was thereafter entered into by said corporation, the defendant and others, under which the road was built and leased to the defendant. Under said agreement it was provided that the L. V. Ex. RR. Co. should issue first mortgage bonds not exceeding \$350,000, sufficient to construct the road and bridges; that parties to the agreement other than said corporation and the defendant agreed to purchase these bonds, defendant agreeing that when the road was completed it would take a lease of it in perpetuity, in the form and on the conditions then agreed upon. The road having been built on December 31, 1883, an agreement was entered into between said road and defendant by which

the former leased to the latter its road, and the latter agreed to equip, maintain and operate the demised road as a part of its line and to keep it in good repair, pay taxes assessed upon it and certain other expenses and to pay the interest and principal at maturity of said bonds. It was also agreed that the whole of the annual gross earnings of said road should be applied and used annually; *first*, to the payment of the interest upon said bonds as the same became payable, and *second*, to the creation and payment into a sinking fund for the gradual redemption of and payment of the principal of said bonds. The charters of both corporations gave them power to make the contract.

Denis O'Brien, D. G. Griffin, and Louis Hasbrouck, for applt.

Edward C. James and E. R. Herriman, for resp't.

Held, That the Vermont corporation was not dissolved by a mere failure to build its road within the time prescribed by its charter; that a judicial proceeding and judgment were necessary to effect such a dissolution. 34 Vt., 2.

In re B. W. & N. R.R. Co., 72 N. Y., 245; 75 id., 335; Brooklyn R. T. Co. v Brooklyn, 78 id., 525, distinguished.

Also held, That the lease was valid, it being within the corporate powers of both parties.

A corporation given capacity to contract may exercise that capacity with any party in or outside the limits of the State, unless the law-making power of the other State forbids. 13 Peters, 519; 93

N. Y., 609; 99 id., 12; 39 id., 171; 103 id., 251.

The principal only of defendant's income bonds was secured by mortgage, the interest was subject to the condition that "the net earnings of the railroad and other earnings of the company" for each year should be sufficient. It was also provided that the words "net earnings" in the bonds should be determined by defendant's board of directors. The coupons attached to the bonds is a promise on the part of the defendant to pay the sum named "or so much thereof as its net earnings for the year then ending according to the terms of the bond will pay." All defendant's railroad and its branches with its franchise, and all income and profits, "privileges, rights and real estate * * *" together with all its rolling stock, "and other property now owned or hereafter to be owned or acquired by said company, and in any way belonging or appertaining to the said railroad of said company" were covered by the mortgage which provided that it was subject to the right of the company "to retain the free and uncontrolled use, enjoyment, possession and management of the premises, rights and property granted or intended so to be, so long as it shall pay the principal and interest of the first consolidated mortgage bonds and the principal of said income mortgage bonds according to their terms." The mortgage also provides that any subsequently acquired franchises, lands, equipment or other property, or interest

of any name or nature, for the use of or in connection with its railroad, or for the purpose of its incorporation," shall be held subject to the lien and it appeared that the net earnings were not sufficient to pay the accrued interest on the income bonds. Plaintiffs claimed that defendant's income is charged with the payment of plaintiffs' bonds, and is not applicable to any contract subsequently entered into until that charge is extinguished.

Held, Untenable; that plaintiff so far as any claim is now involved was simply contract creditor, having a debt against the corporation, but no lien by mortgage, and with no other right than to have it paid out of the proper fund, viz., its net earnings, the amount of which is to be determined by its board of directors at the expiration of each interest period; that the power of the corporation to change the condition of its road by additions or extensions and improvements consistent with the purposes of its incorporation is not limited and restrained by the provisions of the bond. The parties must be deemed to have understood that the prospective wants of the railroad would be supplied in the usual manner, if upon credit that an indebtedness would be created, and if for cash that both the indebtedness contracted and the cash paid must come either from the earnings of the company or sale of its property; that the parties contemplated a line of active and efficient railroad and not one in suspense or liquidation; that the lease being valid and within the powers of the

company, and the company being entitled to all its earnings, they must be applied in the discretion of its directors for such lawful purposes as they approve.

Judgment of General Term, affirming interlocutory judgment for plaintiffs entered upon an order overruling a demurrer to plaintiffs' complaint, affirmed.

Opinion by *Danforth, J.* All concur.

RES ADJUDICATA.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

James H. Van Gelder, *respt.*, v. Prentiss W. Hallenbeck, *applt.*

Decided Nov., 1887.

The estoppel of a former judgment or decision extends to those matters which, though not expressly determined, are comprehended and involved in the thing expressly stated and decided, whether they were or were not litigated or decided.

Jacob Van Gelder and David H. Van Gelder obtained judgment against James H. Van Gelder, the plaintiff here, and in Feb., 1877, execution thereon was issued to this defendant, then sheriff. In another action by this plaintiff against Jacob and David H. plaintiff obtained an injunction staying proceedings upon the above execution and this stay continued until Jan. 15, 1881, when the premises were sold under the execution. On that day plaintiff served a demand on this defendant that his fees be taxed. The sheriff, this defendant, gave notice of taxation for March 8, 1881. Code Civ. Pro., § 3287. The taxation was had and

at the same time a motion made by plaintiff was heard to set aside the sale. This motion was granted. The sheriff's fees were taxed for printing and poundage at \$41.08, his claim for advertising, in amount \$500, being nearly wholly rejected. The sheriff appealed from the taxation; the General Term considered the printer's fees for postponements a proper charge and reversed the order, 26 Hun, 358, and upon appeal to the Court of Appeals the General Term order was affirmed. 89 N. Y., 633. No formal order taxing the fees in accordance with that reversal was ever entered. While the appeal was still pending in the Court of Appeals and in Jan., 1882, plaintiff began this action against the sheriff for a penalty of \$1,000 under Code Civ. Pro., § 1436. On June 22, 1882, two days after the appeal was decided, he got leave to amend his complaint, and in Aug., 1882, served an amended complaint and sued also for money remaining in the sheriff's hands. The referee dismissed the complaint as to the first cause of action, but gave judgment on the second for \$90.39. This result he reached by a reduction of the printer's fees to \$454.65, and a reduction of the sheriff's fees to \$29.75.

J. H. Van Gelder, for plaintiff.

J. B. Olney, for defendant.

Held, Error. The estoppel of a former judgment extends to those matters which, though not expressly determined, are comprehended and involved in the thing expressly stated and decided, whether they were or were not litigated or de-

cided. Whatever is necessarily implied in the former decision is for the purposes of the estoppel deemed to have been actually decided. 98 N. Y., 351; *id.*, 272. The real question before the General Term was whether the sheriff could collect for printing postponements after six weeks, and the sheriff insisted that he could collect all the fees charged. The order of the Special Term as to the taxation was wholly reversed at General Term and in the Court of Appeals, and although no formal order was entered it was evidently thought that this reversal of an order, which had struck out these printers' fees, had replaced them and had taxed the bill as presented. What the justice at Special Term did not strike out was allowed, and what he did strike out was restored by the General Term and Court of Appeals. At Special Term plaintiff had an opportunity to make any objection to these disbursements. And if any had been rejected by the General Term on appeal the order at Special Term could have been modified. But it was reversed wholly, and in that was involved the question whether these disbursements were proper. An examination of this matter in 26 Hun, 358, will show that the orders of General Term and Court of Appeals were practically a taxation. Defendant, a public officer, should not be further vexed.

Judgment reversed and new trial granted.

Opinion by *Learned, P.J.*; *Williams, J.*, concurs; *Landon, J.*, dissents.

LIFE INSURANCE. ESTOPPEL.

N. Y. COURT OF APPEALS.

Miller, *applt.*, v. The Phoenix Mut. Life Ins. Co., *respt.*

Decided Nov. 29, 1887.

Where the agent of the insurer draws up the application and inserts the answers at his own suggestion, the insured stating that he does not know the facts called for by the interrogatory, the insurer is estopped from setting up the falsity of the answer in avoidance of the policy.

This action was brought by plaintiff to have a policy issued by defendant declared valid. It appeared that the policy in question was issued on an application the answers to which were written in by D., a general agent of the defendant. The insured was a German who very imperfectly understood the English language. To the question when and where he was born, he replied he did not know, and upon being informed that an answer must be given repeated his former answer. D., the agent, made a computation and wrote his conclusion in the application. The answers therein were not read over to the insured. No fraud was alleged or found. The contract was repudiated by the defendant on the ground of alleged misrepresentation as to the age of the insured.

Isaac D. Garfield, for *applt.*

D. O'Brien, for *respt.*

Held, That an estoppel *in pais* was fairly established and the defendant is precluded from setting up the falsity of the statement with reference to age in avoidance

of the policy. 69 N. Y., 260; 74 id., 363; 64 id., 648; 67 id., 383; 36 id., 550; 13 Wall., 222; 21 id., 152; 80 N. Y., 295; 18 id., 392.

Where the application for a policy of insurance is drawn up by the agent of the insurer, and the answers to the interrogations contained therein are inserted by him at his own suggestion, without fraud or collusion on the part of the assured, the insurer is estopped from controverting the truth of such statements or the interpretation which it has given to the answers actually made by the applicant, in an action upon the instrument between the parties thereto. 18 N. Y., 392; 36 id., 550; 64 id., 648.

Judgment of General Term, affirming judgment for defendant, reversed, and new trial granted.

Opinion by *Ruger*, *Ch. J.* All concur.

RAILROADS. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Rebecca Sutherland, *admrx.*, *applt.*, v. The Troy & Boston Railroad Co., *respt.*

Decided Nov., 1887.

The deceased, an engineer, was driving train No. 1 east and his train was late. Defendant's road is a single track and runs east and west. Trains were moved by a despatcher at Troy. J., the operator at P. junction, received a despatch to hold No. 1 for orders. He put out a red flag. At this time train No. 2 moving west received a despatch to meet No. 1 at P. junction. After arrival at P. junction it received a despatch to meet No. 1

at Hoosick, a station further east. It moved on, J. took in the flag supposing the despatch to relate only to No. 2. Trains No. 1 and No. 2 met and passed at Hoosick. During this whole period train No. 6 was coming west from the State of Vermont. Train No. 1 on reaching P. junction saw no flag, did not stop, and about a mile beyond the station collided with No. 6 and the deceased was killed. *Held*, That it was a question for the jury whether defendant had taken sufficient precaution to bring knowledge of its order to the engineer and conductor of No. 1.

Action to recover damages to the widow and next of kin of one whose death was caused as alleged by defendant's negligence. The deceased, an engineer, was drawing freight train No. 1 east from Troy over a single track. He was due at Petersburg Junction at 6.26 A.M. He was late and did not reach there until 8.30. Trains were moved by a despatcher at Troy. Johnson, the operator at Petersburg Junction, received a despatch from the despatcher at Troy to "flag and hold No. 1 for orders." He put out a red flag. At this time train No. 2 moving west received orders to meet No. 1 at Petersburg Junction. It reached there at 7.19 and was held. Thereafter Johnson received a despatch that No. 2 should meet No. 1 at Hoosick. According to rule he gave a copy of this despatch to the conductor and engineer of No. 2. But upon the receipt of this despatch Johnson took in the red flag. At this time train No. 6 which was behind No. 2 and still further east was *en route*. Johnson supposed that No. 1 was to be held solely on ac-

count of No. 2 and it was for this reason he took in the flag after the departure of No. 2. He had never before received orders to hold No. 1 for No. 6. Train No. 1 reached Petersburg Junction at 8.30 and there being no red flag proceeded. About a mile further east it met No. 6, a collision occurred and deceased was killed. A nonsuit was granted upon the ground that deceased and Johnson were co-employees and that there was no evidence of his incompetency or notice thereof to defendant. Plaintiff asked to go to the jury on the question of defendant's negligence in not taking proper steps to prevent the collision. This was refused.

C. E. Patterson, for applt.

E. L. Fursman, and *J. H. Peck*, for resp't.

Held, Error. Within the Shehan case, 91 N. Y., 332, and the Dana case, 92 N. Y., 639, it should have been left to the jury to say whether defendant was guilty of any negligence in not taking additional precautions to bring the knowledge of its order to the engineer and conductor of No. 1. The train despatcher might have ordered them to wait for orders at Petersburg Junction. The train despatcher knew that No. 6 was coming on toward the west. Johnson did not know this. He may have been guilty of some slight negligence in interpreting the despatch to refer only to the approach of No. 2. But this cannot be said of the train despatcher. He knew the danger and the jury should have been allowed to say

whether sufficient precautions were taken.

Judgment reversed.

Opinion by *Landon, J.*; *Learned, P.J.*, and *Williams, J.*, concur.

TRESPASS. LICENSE.

N. Y. COURT OF APPEALS.

Fargis, applt., v. Walton et al., respts.

Decided Nov. 29, 1887.

Plaintiff, who was a tenant of defendant, signed an instrument, not under seal, expressing a consideration of \$1, by which defendant was allowed to make alterations in the building. In an action for trespass, it appeared that the \$1 was not paid or promised, and defendant claimed that the consideration was a new leasing of the premises, which was denied. *Held*, That a nonsuit was error; that the instrument might operate as a license, but could be explained, varied or contradicted by oral evidence, and could be revoked before it was acted on.

This action was brought to recover damages for trespasses upon premises occupied by plaintiff in the city of New York. It appeared that plaintiff was the tenant of the defendant W., occupying rooms on the second floor of 851 Eighth avenue, which is situated on the corner of West 51st street. The first floor of the building was occupied as a store. W. also owned the four adjoining buildings on the north, the lower stories of which were occupied as stores, and the upper stories as dwellings. In April, 1880, W., desiring to make certain alterations and improvements in his stores, procured the plaintiff and

eight other tenants who had rooms above the stores under separate leases to sign an instrument not under seal by which they agreed "for the consideration of one dollar to us paid, the receipt of which we hereby acknowledge, to permit W. or his agents to make any alterations which he or they may deem necessary to carry out the plans and specifications in changing the house we now occupy." The trespasses in suit were committed after the execution of this instrument, and as the defendants claim for the purpose of making the alterations referred to. Plaintiff testified without contradiction that the one dollar was not paid. The only evidence as to the consideration given by defendant was that it was the leasing of the premises for another year. This was denied by plaintiff, who gave evidence tending strongly to support such denial. Plaintiff was nonsuited.

Samuel Jones, for applt.

W. W. Westervelt, for respt.

Held, That plaintiff having been nonsuited her evidence must now be taken as true, and it having been shown that the consideration mentioned in the agreement between the tenants and W. was not actually given or promised, and W. claiming that there was some other consideration, it was incumbent upon him to show it; that even if the promise to pay the one dollar could be inferred from the evidence it was an inference to be made by the jury and not by the court; that the agree-

ment being invalid could not as such furnish a justification to the defendants; that the instrument in question might operate as a license, but not being binding as an agreement it was not conclusive and binding as evidence against plaintiff, and while it was more cogent and persuasive than oral evidence it was of no higher nature and could be explained, varied or contradicted by oral evidence. 12 Daly, 370.

Plaintiff testified that the license she actually gave and intended to give related only to alterations to be made on the south side of the building and such alterations were all completed before the trespasses complained of were committed.

Held, That plaintiff could not be bound by a license broader and of greater scope than she actually gave and that the one given, like an oral license, could be revoked before it was acted upon.

The case must be a peculiar and exceptional one which would authorize a licensee to proceed under his license after its revocation by the licensor, and courts are disinclined by the application of rules relating to estoppels *in pais* to give to mere licenses, based upon no consideration, the force and effect of valid agreements. 1 Abb. Ct. App. Dec., 27; 73 N. Y., 579; 84 *id.*, 31.

Judgment of General Term, affirming judgment on verdict directed for defendant, reversed, and new trial granted.

Opinion by *Earl, J.* All concur.

ADMINISTRATION. JURISDICTION.

N. Y. COURT OF APPEALS.

In re estate of Page, deceased.

Decided Nov. 29, 1887.

Where, in an application by the public administrator of N. Y. City for letters of administration no one appears on his behalf on the return day of the citation, and counsel for the widow and next of kin appear, but no order is made, the surrogate loses jurisdiction.

This was a proceeding by the widow and next of kin of P., a resident of Vermont, deceased, to set aside and revoke letters of administration issued by the surrogate of New York to the public administrator. It appeared that a citation was issued to said widow and next of kin, informing them of an intended application by the public administrator for letters of administration upon the estate of P., and that such application would be made to the surrogate at the court house at a certain day and hour. Upon the day and hour named in the citation the counsel for the widow and next of kin appeared before the surrogate ready to oppose the application. There was no appearance upon the part of the public administrator. After the second call of the calendar, said counsel was informed by the surrogate that there was no such application upon the calendar for that day. He then left. No application was made that day, but subsequently and without notice to counsel for the widow and in his absence letters were applied for and issued to the public administrator.

Alfred R. Page, for applt.

Lewis Sanders, for resp't.

Held, That the public administrator not having appeared on the return day of the citation, and no order having been made by the surrogate adjourning the case to some specified time, he lost jurisdiction.

Section 220, of the New York Consolidation Act, Laws of 1882, Chap. 410, limits the provisions of Subd. 1, of § 219, of said act, so that the public administrator has no right of administration upon the estate of one who was not a citizen of this State dying intestate without the State, leaving effects within the county of New York, except in cases mentioned in the two sub-divisions of § 220. The public administrator has however a contingent right of administration after the refusal of others who have a prior right. The provision of the Revised Statutes as to those entitled to letters of administration, 2 R. S., 74, § 27, has not been repealed by the Code of Civil Procedure.

The widow and next of kin of a citizen of the United States who is a resident of another State and dies leaving effects in this State are entitled to letters of administration in the order of priority named in the statute. The proceeding may be initiated by the public administrator, and if it appears upon the application that there is a widow or relative competent, qualified and willing to act, letters should be granted to such person, and if not, then the public administrator has the right

to administer. If no application is made by the widow or next of kin within a reasonable time for original or ancillary letters, if there are creditors living in the county of New York, it would be the duty of the public administrator on proper notice to apply for letters and proceed as provided for in the statute.

The surrogate and the General Term held that the letters were valid and should not be revoked.

Held, That this afforded a justification for the action of the public administrator, and his good faith not being questioned the taxable cost of the proceedings should be paid out of the estate.

Order of General Term, affirming order of surrogate denying motion, affirmed.

Opinion by *Peckham, J.* All concur.

PARTNERSHIP.

N. Y. COURT OF APPEALS.

Serviss, applt., v. McDonnell, impl'd., resp't.

Decided Nov. 29, 1887.

On the death of one of the partners in a firm his widow and son formed a new partnership with the survivors, the agreement providing that the widow and son should pay one third of the liabilities of the old firm. *Held*, That their liability, if any, must be measured by such agreement, but that it could be enforced only by the old firm and not by its creditors.

This action was brought in Feb. 1884, upon two promissory notes, made by the individual members of the firm of McD., K. & H., and given in consideration of money

loaned to said firm. Said notes were payable in one year from April 1, 1873, with interest. McD. died, and thereafter in Feb., 1878, his widow and son with the two surviving partners formed a new firm under the same name, and the complaint alleges that in consideration of the transfer to the new firm of the business and property of the old they agreed to pay into said new firm and for the purpose of carrying on said business certain large sums of money, and to assume and pay all the obligations, debts and liabilities of the old firm, among which were the notes in suit, no part of which had been paid except the interest to April 1, 1883. Judgment was demanded against the widow and H. This action was commenced Feb. 7, 1884. The widow alone answered, in substance denying the material allegations of the complaint, and setting up the statute of limitations. The partnership articles of the new firm provided that the widow and son were to have one third interest therein and should pay "one third of the liabilities of the late firm."

Nathaniel C. Moak, for applt.

N. P. Hinman, for respt.

Held, That defendant's liability, if she was liable, must be measured by the articles of co-partnership and could not exceed one third of the debts of the old firm.

An incoming partner is not of course liable for the debts of the firm, whether he succeeds an outgoing partner by purchase, or whether upon the death of one partner he joins with the survivors

in carrying on the business by virtue of a new partnership. He may become liable by agreement, but an undertaking on his part alone or in connection with others that the new firm will pay the debts of the old, can be enforced only by the old firm, and the creditors could not sue for the breach of it. 97 N. Y., 296.

Judgment of General Term, modifying and affirming as modified judgment on verdict for plaintiff, affirmed.

Opinion by *Danforth, J.* All concur.

EASEMENT. DEED.

N. Y. COURT OF APPEALS.

Root, respt., v. Wadhams, applt.

Decided Nov. 29, 1887.

Where the right to conduct water from one parcel of land to another across the intervening land of other parties rests in mere parol license, such right does not pass under a deed by the use of the word "appurtenances," nor as an easement by implication.

Reversing S. C., 21 W. Dig., 11.

This action was brought to enjoin defendant from discontinuing a pipe on her premises which supplied plaintiff with water from a spring situated upon other premises, and to enforce her right to a supply of water from said spring.

It appeared that one B. owned two lots of land conveyed to him by different parties, which were separated by an intervening lot; that upon one of the lots owned by B. there was a spring, from which he had allowed the owner of

the intervening lot, by a parol license, to lay a pipe to conduct the water to his house, informing him that he should charge an annual rent therefor. He subsequently allowed the tenant of the other lot with the consent of the owner of the intervening land to lay a pipe to said owner's house for the purpose of conducting the surplus water to his own house. This right also rested on parol license. B. subsequently sold the lot upon which there was no spring to R., who conveyed it subsequently to plaintiff's grantor. The premises were described in the deed by metes and bounds and were conveyed "with the appurtenances thereto belonging;" they contained no limitation or reservation whatever, no mention of any right in any one to any spring or to the water thereof, in whole or in part, or to the use of the same. In the character of B.'s tenant, and subsequently as his grantee, it is understood that his right to conduct the water rested simply upon a parol license.

Geo. W. Ray, for applt.

A. F. Gladding, for respt.

Held, That this action could not be maintained; that there was nothing but a mere parol license proved from the grantor of the defendant and the right to take or convey water from defendant's premises did not pass to plaintiff by the use of the word appurtenance in any of the deeds to her or her grantors, nor did such a right pass as an easement by implication. 62 N. Y., 526; 86 id., 246; 106 id., 165.

Lampman v. Milks, 21 N. Y., 505; *Curtiss v. Ayrault*, 47 id., 78; *Adams v. Conover*, 87 N. Y., 422, distinguished.

Judgment of General Term, affirming judgment for plaintiff, reversed, and new trial granted.

Opinion by *Peckham, J.* All concur.

MURDER.

N. Y. COURT OF APPEALS.

The People, *respts.*, v. Driscoll, *applt.*

Decided Nov. 29, 1887.

Evidence sufficient to sustain a conviction of murder in the first degree.

Defendant was convicted of the crime of murder in the first degree in having killed G. by discharging a pistol at her. It appeared that about two weeks prior to the killing of G. defendant had an altercation with one M. in the street, upon which occasion M. fired two shots at defendant, but did not injure him. The crime charged against defendant was committed upon the first floor of M.'s house, which consisted of a hall extending to the rear of the house with two rooms to the left. A door opened into each one of these rooms from the hall and these rooms opened into each other by folding doors. Defendant's version of the transaction is, that about midnight of June 25, 1886, he met a man and two women, one of whom was G., at a drinking saloon in Worth street, and they remained together until after G.

was shot. For several hours of that night they wandered from one saloon to another, drinking frequently at each place visited, until they reached M.'s house, which they entered without any apparent reason for doing so, G. going first, followed by defendant and their companions. They advanced from the hall into the front room, G. leading the way. As she entered the door a shot was fired by some one inside which killed her. Defendant did not recognize the person who fired the shot, but his male companion swore it was M. They both testified that defendant did not fire a shot that night. Defendant swore that after the shooting of G. he immediately ran away and remained in hiding until he was arrested. There was much direct evidence given by the prosecution to controvert defendant's version. At the time of the shooting there were six or eight people in the room where it occurred, some of whom were asleep, others playing cards, others watching the game and engaged in conversation. M. was in the front room and testified that when the door opened and the deceased entered he saw defendant behind her and immediately advanced to the door and shoved him out of the room, that immediately thereafter he saw a pistol thrust through the door and fired into the room; that he immediately ran through the folding doors into the next room and jumped out of the window into the yard. From there he entered the basement and while there heard a second shot

fired apparently in the hall above. That he went directly from the basement into the upper hall and from there into the street and after an absence of about fifteen minutes returned and found G. lying upon a bed in the back room, with the police and physicians in attendance. M. also testified that he did not fire off a pistol during the affray. One W. testified that she was in the hall when G. and defendant entered and they advanced to the door of the front room, which, after opening, G. entered, and, as she saw M., gave a signal to defendant who advanced to the door and fired a pistol into the room, whereupon the door was crowded back against him, and he then went to the door of the back room and after forcing it open pointed the pistol into the room and fired again, the ball discharged therefrom striking G. whom she could then see standing at the folding doors between the two rooms, and who fell to the floor. Two witnesses who were in the rooms at the time testified that only two shots were fired, both coming from the hall, the first through the door of the front room, the second through that of the back room, whereupon G. exclaimed "I'm shot" and fell to the floor. They also swore that M. as well as most of the occupants of the rooms had jumped out of the back window before the second shot was fired. After the affray a ball of larger calibre than that used in M.'s pistol was found imbedded in the wall of the front room nearly opposite to the door

opening into the hall. Immediately after the shooting defendant was discovered running from the scene, wearing a sack coat, having his right hand in his pocket. He was found about fifteen minutes later in a dark room in his mother's house near the place of the affray, lying on the floor, dressed in his coat and pantaloons. His sack coat could not be found. Upon being arrested he said he had been sleeping there since 8 o'clock the night before, and denied having been at M.'s that night. It also appeared that defendant and G. and their companions were met shortly before the shooting by a policeman and that after defendant had used violent language to G. she replied: "You shoot him and I'll stick by you." Immediately after the shooting while at M.'s house G. stated that M. had shot her. M. immediately denied this, delivered up his pistol to the policeman, the pistol being fully loaded, its barrels cold, and none of them appearing to have been recently discharged. On being removed to the hospital G. repeated her accusation against M. and later in the day on being informed that her wound was fatal told her mother that defendant had shot her. The jury rendered a verdict of guilty.

Wm. F. Howe, for applt.

McKenzie Semple, for respts.

Held, No error; such proof being produced and such corroboration afforded to the testimony of the inculpatated witnesses as justified the verdict rendered by the jury.

Certain objections were raised, but the facts attempted to be excluded by them having already been proved by evidence not objected to by defendant, they were untenable.

Judgment of General Term, affirming judgment of conviction, affirmed.

Opinion by *Ruger, Ch. J.* All concur.

SHOPKEEPERS BAILMENT.

N. Y. COMMON PLEAS. GENERAL TERM.

Jennie V. Bunnell, respt., v. Isaac Stern et al., appls.

Decided Jan. 3, 1889.

The general liability of a shopkeeper for the loss of a garment removed by an intending purchaser while in said shop, for the purpose of trying on another garment there for sale, is to be measured by the law of bailments.

Where it appears that such garment was by the owner laid on a counter intended for sale and exhibition of goods only, and was in no way put in charge of defendants or their employees, and was lost, there being no proof of negligence or wrong on defendant's part, the shopkeeper is not liable.

Appeal from judgment of District Court, in plaintiff's favor.

Action to recover the value of a cloak, lost by plaintiff while shopping in defendants' store. She had gone into the store for the purpose of buying a cloak. After looking at several she took hers off, to try on one she had selected, and placed her cloak on a counter intended for the sale, etc., of goods and did not call the attention of defendants' servants to the fact,

nor did any of them take charge of it. After leaving her cloak on the counter, plaintiff walked about eight feet away to a mirror, where she put on the selected garment and examined it. Within five minutes she concluded to buy the new wrap, and returned to the counter for hers; but it was gone, and could not after search therefor by defendants' employees be found.

On this state of facts, the justice found a verdict for plaintiff.

M. S. Isaacs, for appls.

L. B. Bunnell, for respt.

Held, That defendants' liability, if any, must be found in the law governing bailments. The duties and responsibilities of a bailee cannot be thrust upon one without his knowledge and against his consent. They must be voluntarily assumed by the party to be charged, or his agents, duly authorized. 60 N. Y., 278; Story on Bailments, § 60. In this case there was no actual or constructive acceptance of the care of plaintiffs' property by defendants, and consequently no bailment. But granting that the mere laying of the cloak on the counter without bringing the fact to the attention of defendants' servants was a constructive deposit, it was for the benefit of the bailor alone, and constituted a gratuitous bailment only; and there could be no recovery without proving gross negligence or fraud. Edwards on Bailments, § 43; Story on Bailments, §§ 68, 72; 33 N. W. Rep., 643.

No such proof was offered in

this case. Defendants showed that they had floor walkers on that floor, and as far as appears the same care and general oversight was taken of plaintiff's cloak as was taken of their own goods.

Plaintiff contends that the general invitation extended to all to enter the store and deal with defendants, and the readiness, on their part, to allow her to take off her own cloak, and try on a new article, coupled with the expected sale of the same and plaintiff's determination to buy it, constituted both an invitation to take off her cloak and a valuable consideration for its care.

Held, That this contention cannot be upheld. 1 Hilt., 193; 141 Mass., 561. In this case negligence, if any, was on the part of plaintiff, in leaving her property on a counter not intended for such purpose, but for the sale of goods; and that without calling the clerk's attention to the fact.

Judgment reversed and new trial ordered.

Opinion by *Bookstaver, J.*; *Van Hoesen, J.*, concurs.

CONTRACT. STATUTE OF FRAUDS.

N. Y. COMMON PLEAS. GENERAL TERM.

William S. Hodge, respt., v. *George W. Newton et al., appls.*

Decided Jan. 3, 1888.

Where there has been a completed contract of employment for one year between the parties, though void under the Statute of Frauds, as not being in writing, and not to be performed within one year from

the time it was made, and the employee continued with the employer, in the same capacity, and at the same wages, without any new employment, a new hiring at the same terms for the ensuing year will be implied.

Appeal from judgment of General Term of City Court, affirming a judgment in favor of plaintiff entered on verdict.

Plaintiff was hired by defendants as a salesman, at a certain salary, for one year from Oct. 10, 1885. The hiring took place some days before this date, and was unwritten. The contract was performed on both sides, and on Oct. 10, 1886, plaintiff continued in defendant's employment in the same capacity, and at the same wages, without new agreement. On Jan. 10, 1887, he was discharged without cause, and brings this action, claiming damages for breach of an implied contract of employment for one year from Oct. 10, 1886.

The court charged that if the jury found there was originally a contract between the parties for one year, though void under the Statute of Frauds, and if plaintiff thereafter continued with defendants in the same capacity, without new arrangement, they might find a new contract for the ensuing year. To this defendants excepted. The jury found for plaintiff.

W. Larremore, for applt.

C. Putzel, for respt.

Held, No error. The new contract is implied from what is presumed to be the intention of the parties, ascertained from their acts. It is valid, because it is made the instant performance

under it commences, and being valid in itself it cannot be affected by the invalidity of the old one. There is besides no question as to the invalidity of the old contract, because it has been fully performed.

Judgment and order affirmed, with costs.

Opinion by *Daly, J.*; *Van Hoesen* and *Bookstaver, JJ.*, concur.

ADVERSE POSSESSION.

N. Y. SUPERIOR COURT. GENERAL TERM.

Max Danziger, respt., v. *John Boyd et al.*, *appls.*

Decided Dec. 12, 1887.

To constitute an adverse title under 2 R. S., ch. 1., title 2, art. 4, § 147, there must be some specified title, whether good or bad, under which the adverse claim is made, and there is no such color of title when possession was taken purely by mistake as to the boundaries of a deed.

Appeal from judgment entered upon verdict.

Action in ejectment.

The appellant contended that the deed to plaintiff, under which he claims title to the premises in question, was, under the provisions of the Revised Statutes, void, for the reason that at the delivery thereof to plaintiff such land was in actual adverse possession of defendant, claiming under title adverse to plaintiff.

Townsend & Mahan, for applts.

L. Sanders, for respt.

Held, That nothing can satisfy the language of the statute but the existence of some specific title under which the adverse claim is

made. The title may be good or bad, but there must be, at least, a color of title opposed to the title of the grantor in the deed; and there is no such color of title when the possession was taken purely by mistake as to the boundaries of a deed. 22 N. Y., 170.

Judgment affirmed, with costs.

Opinion *per curiam*.

SURVIVAL.

N. Y. SUPERIOR COURT. GENERAL TERM.

James E. Lyon, *applt.*, v. Trenor W. Park et al., *respts.*

Decided Dec. 12, 1887.

The only modes in which the court can give a party the benefit of § 755, Code, as to non-abatement of certain actions are those provided by the succeeding sections.

When one of two defendants dies, the action cannot be continued against his representatives under the provisions of § 757, Code.

The provisions of the last sentence of § 758, Code, as to severance of action on joint and several liability, in case of death of one of several parties, are discretionary, and not to be applied in case of great laches.

Appeal from order denying plaintiff's motion for leave to revive the cause against the estates of Park and Baxter and give security for costs.

This motion was made by plaintiff in August, 1886, for leave to continue the action against the estates of Park and Baxter, and also to be relieved from his default and failure to file an undertaking for costs as required by order of the court, made June 11, 1878, and

that he be now permitted to comply with that order. The alleged cause of action arose in Nov., 1871, out of an alleged conspiracy to cheat and defraud plaintiff.

Warren Higley, for *applt.*

Ewing & Southard and W. O. Campbell, for *respt.*

Held, The modes in which a court can give to a party the benefit of § 755, Code Civ. Pro., are only those provided by the succeeding sections.

When one of two defendants dies, as Park in this case, the action cannot be continued against his representatives under the provisions of § 757. 82 N. Y., 576. If, which is not affirmed, any other sections apply to Park, it is § 758, in its last sentence. By that, the matter is left to the discretion of the court, acting upon special circumstances. The laches have been such that the representatives of Park have lost those ordinary means of investigation and defense that they would have had if an earlier application had been made. Even if it were the misfortune of plaintiff that he has not been able before this time to procure security for costs, the effect of the lapse of time would be injurious to defendant's defense.

The motion is denied as to Park's representatives.

The representatives of Baxter have not been brought before the court on this motion, and indeed there are no representatives that could be competently sued in the courts of this State.

Order affirmed on opinion below.

Opinion *per curiam*.

ANTENUPTIAL AGREEMENT. ESCHEAT.

N. Y. COURT OF APPEALS.

Johnston v. Spicer et al., *appls.*
Spicer et al., *respts.*

Decided Oct. 18, 1887.

An ante-nuptial agreement provided that on the death of either without issue the property of the one so dying should be the property of the other. The husband died intestate, and shortly after the wife died intestate, without issue and with no known heirs. *Held*, That the wife became the equitable owner of the husband's real estate and her interest reverted to the State, though not technically by escheat; that the legal title descended to the husband's heirs at his death and was held as a naked trust subject to the right of the widow to be vested with title on demand, and they had a right and standing to raise the objection that an act releasing the rights of the State in the land did not vest the right of the widow in the grantees from the State.

Chapter 377, Laws of 1885, is unconstitutional.

The controversy in this case arose among the heirs of G. S., over the distribution of surplus moneys arising from a sale under the foreclosure of a mortgage. It appeared that on June 29, 1847, a contract was made by G. S., in contemplation of marriage with one E. D. The contract was executed by G. S. as party of the first part, E. D. of the second part and P. C. of the third. The party of the second part thereby conveyed certain real and personal property to C., in trust for her own use and benefit, and the contract then provided that if G. S. died before E. D. without leaving issue all his property should belong to E. D.,

and in case E. D. died without issue before G. S. all of her property should belong to G. S. and the trustees should by good and sufficient conveyances assign the same to him. G. S. and E. D. subsequently married but had no children. G. S. died intestate July 1, 1884, seized of the lands out of which the surplus money arose which he acquired in 1883 and leaving numerous heirs at law; his widow died in Jan., 1885 intestate, and leaving no lawful heirs. The appellants claim as legal heirs of G. S., and the respondents, who were also a portion of his heirs, claim the exclusive right to the surplus moneys under Chap. 377, Laws of 1885, "An act to release the interest of the People of the State of New York in certain real estate to * * (said heirs), and for other purposes," which they procured to be passed.

Edward F. Brown, for *appls.*

Charles De K. Townsend, for *respts.*

Held, That upon the death of G. S. his widow became by force of the marriage settlement the equitable owner of the real estate, and upon her death without heirs her interest therein reverted to the State though not technically by escheat. No express trust was created by the marriage contract, but a trust by implication in the property of G. S. arose upon his death in favor of his widow; that the legal title vested in him descended to his heirs at his death by force of the statute of descents, but they held it as a naked trust

merely for the equitable owner, and subject to her right to become vested with the title upon demand. 5 Paige, 561; 38 Barb., 479.

Ante-nuptial contracts by which it is attempted to regulate and control the interest which each of the parties to the marriage shall take in the property of the other during coverture or after death, like dower, are favored by the courts and will be enforced in equity, according to the intention of the parties, whenever the contingency provided for by the contract arises. 2 Kent's Com., 165; 27 Hun, 54; 92 N. Y., 235.

No especial formality is requisite in this instance and in order to effectuate the intention of the parties, Courts of Equity will impose a trust upon the property agreed to be conveyed commensurate with the obligations of the contract, or will decree its specific performance, and when such relief is inadequate or impracticable from the situation of the property or the character of the contract will award damages for its breach. 6 Barb., 496; 99 N. Y., 29; Pomeroy's Eq. Jur., §§ 1297, 1403; Schouler on Dom. Rel., 263-266; 71 N. Y., 156. It is immaterial whether a trustee to carry it into effect has been appointed in the contract, or whether the property agreed to be conveyed be owned by the parties at the time of the execution of the contract, or is expected to be subsequently acquired, if the contract is fair and reasonable and such as it is lawful for the parties to make, and the rights of creditors or third persons

have not intervened it will be enforced in equity, in such manner as to accomplish the object the parties had in view without reference to the validity of the contract at law. 2 Barb., 325, 334; 6 id., 496; Atherly on Mar. Set. Lond., 1813, 58; Pomeroy Eq. Jur., §§ 1297, 1403; 46 Barb., 84; Bright on Hus. and W., 471; 2 Vernon, 97; 2 Story's Eq. Jur., §§ 976, 1370, 775; 2 Kent's Com's., 172; 3 J. Ch., 523, 481; 6 H. of L. Cas., 375; 10 L. R. Eq., 585; 12 Cl. and Finn, 485; 99 N. Y., 29.

All rights of property of whatever nature they may be revert to the people when the owner dies intestate and there is a failure of heirs or next of kin to take such property. 4 Kent's Com's., 425; Edw., 177; 3 Washburn on R. P., 49; 2 B. Monroe, 393. There is no substantial difference between real and personal property, in respect to the rights acquired by the State upon the death of its owner, intestate, without heirs or next of kin. The doctrine of escheat applies only to legal estates and does not in a strict sense affect either real estate or personal property.

Section 1, of Chap. 377, Laws of 1885, purports to release to certain persons described in its title the real estate described therein. The second section released to said persons all interest the State had in the personal property of which E. died possessed.

Held, That this act was violative of § 16 of Art. 3 of the Constitution, which provides that "no private or local bill * * * shall embrace more than one subject

and that shall be embraced in the title." 70 N. Y., 350; 35 id., 452; 4 Hill., 418; 8 N. Y., 253.

Also held, That the legal title to the property in question being in the heirs of G. S. when the act of 1885 was passed they were for that reason presumably in possession of the property and the legal owners thereof, that this title and possession they had a right to maintain against all persons except E. or those who had lawfully succeeded to her rights, and had such a standing in court as authorized them to raise the objection that the act of 1885 did not vest the rights of E. in the grantees from the State.

Order of General Term, so far as it reverses order of Special Term, directing distribution to the grantees of the State, affirmed, and that part directing a distribution of the surplus among all the heirs of S. reversed and case remitted for further hearing.

Opinion by *Ruger, Ch. J.* All concur.

N. Y. CITY. NEGLIGENCE.

N. Y. COMMON PLEAS. GENERAL TERM.

Charles Mayer, *applt.*, v. The Mayor, etc., of N. Y., *respt.*

Decided Jan. 3, 1888.

Chapter 572, Laws of 1886, in regard to filing notice prior to bringing actions for personal injuries against certain cities, was not intended to apply where the action is commenced within the six months by the service of the summons and complaint on the corporation counsel, for then the notice required for the city's

protection is fully given by the action itself.

Appeal from judgment entered upon dismissal of complaint.

Action for damages for injuries sustained in falling into a basin in sidewalk in this city. The defense, among other things, was a denial "that plaintiff caused to be filed in the office of the counsel to the corporation of the city of New York, within six months after the cause of action accrued, notice of his intention to commence this action, and of the time and place at which such injuries were received." Defendant moved to dismiss the complaint upon the ground that the evidence showed that plaintiff had failed to comply with the provisions of Chap. 572, Laws of 1886, as to above notice. The injuries of plaintiff were received July 9, 1886, and action was commenced by voluntary appearance of defendant Oct. 4, 1886. Five days before such appearance, and on Sept. 29, 1886, copies of the summons and complaint were left at the office of the corporation counsel with a clerk in his employ in the expectation that a notice of appearance would be sent to plaintiff's attorneys. The complaint was dismissed for failure to file with the corporation counsel the notice required by the statute aforesaid.

Ullo, Ruebsamm & Hubbe, for *applt.*

M. J. O'Brien, for *respt.*

Held, That the statute of 1886 was intended to prevent the mischief that might ensue from plaintiff's delaying to bring his action

for injuries until so long after the alleged occurrence that the means of preparing a defense might be lost or greatly impaired. The statute was not intended to apply where the action is commenced within the six months by the notice of the summons and complaint on the corporation counsel, for then the notice required for the city's protection is given in the fullest manner by the action itself. The leaving of the proposed summons and complaint with the corporation counsel prior to the appearance is a substantial compliance with the statute.

Judgment reversed and new trial ordered, costs to abide event.

Opinion by *Daly, J.*; *Larremore, Ch. J.*, and *Van Hoesen, J.*, concur.

DIVISION FENCES.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Jonathan Crandall, *applt.*, v. John B. Eldridge, *respt.*

Decided Nov., 1887.

Plaintiff and defendant owned adjoining farms. Defendant neglected to maintain his part of the division fence and plaintiff's colt passing through the opening fell into a morass on defendant's farm and was drowned. *Held*, That plaintiff could not recover.

The statutory duty as to division fences imposed by Chap. 261, Laws of 1888, concerns only adjoining owners and is not a duty due to the public. Hence a failure to comply with the statute is to be measured as to its penalty by the statute, and that penalty cannot be enlarged.

Plaintiff and defendant owned adjoining farms. Defendant neg-

lected to maintain his part of the division fence. Plaintiff's colt passed from plaintiff's land through the defective fence, fell into a morass upon defendant's land and was drowned. Defendant succeeded below.

James White, for *applt.*

J. G. Sherman, for *respt.*

Held, No error; that the action could not be maintained. Independently of the statute as to division fences, 1 R. S. m. p., 353, § 30, plaintiff would have no right of action. The liability incurred by disregarding the statute is fixed by Chap. 261, Laws of 1888, and extends only to damages to lands and the crops, fruit trees and shrubbery thereon and fixtures connected therewith. See the case in 3 Hill, 38, where it is stated that the statute does not take away the common law action of trespass if one owner chooses to allow his land to lie open. The statute thus allows parties to elect between common law rights and liabilities and statutory rights and liabilities, and the inference is strong that when they elect to be governed by the latter they elect to assume only such liabilities as the statute declares.

This case differs from that of *Graham v. President, etc.*, of D. & H. Co., decided at this term. We there held that the duty of the corporation was in part owed to the public. The division fence statute concerns only adjoining owners, tenders them an optional relation and regulates its conditions. Public policy does not require that their failure to observe

the duty should entail any further liability than the statute prescribes.

Judgment affirmed.

Opinion by *Landon, J.*; *Parker* and *Fish, JJ.*, concur.

RAILROADS. NEGLIGENCE.

N. Y. COURT OF APPEALS.

Lilly, applt., v. The N. Y. C. & H. R. RR. Co., *respt.*

Decided Dec. 23, 1887.

Plaintiff was a brakeman in defendant's employ, and was knocked from a car by a collision with the engine, and pushed before the car until he was run over. It was proved that the accident could not have happened if the brake had been in good order and well set. *Held*, That a nonsuit was error.

This action was brought to recover damages for injuries received by plaintiff while in defendant's employ. Upon the trial plaintiff testified that he was one of defendant's brakemen, and was assigned to duty in and about the Grand Central depot in New York and the yard and grounds adjoining. He was knocked off from a car on which he was at work by a collision with an engine which had been sent to bring the car which had been standing in the yard. The car after being struck by the engine moved about 200 feet, rolling the plaintiff along in front of it until the brake beam was raised sufficiently high to pass over plaintiff's shoulder so as to allow his legs to come in contact with the wheels which ran over them, rendering amputation nec-

essary. It was proved that if the brake on the car had been in good condition and properly set it would have remained stationary or only moved a few yards. A motion was made to dismiss the complaint, which was granted.

Samuel D. Morris, for applt.

B. F. Tracey, for respt.

Held, Error; that the jury might be asked upon the evidence to say that but for the fact of the brakes being out of order and failing to hold the car at all the plaintiff would have sustained no injury from the collision, and thus it may be said that the proximate direct cause of the injury was the condition of the brakes on the car and that the only effect of the collision was to place plaintiff in a dangerous position from which he might have been extricated without injury if the brakes had been in proper order.

The duty of a brakeman called him to situations of peril in and about standing as well as moving cars, and this peril is of a nature that is recognized as existing by the railroad authorities, and they having assumed to reduce it as far as they reasonably can by the appliance, among other things, of brakes, the failure to have them in order under circumstances such as arise in the present case may be fairly alleged as the cause of the accident.

Judgment of General Term, affirming judgment dismissing complaint, reversed, and new trial granted.

Opinion by *Peckham, J.*; *Ruger*, *Ch. J. Andrews* and *Danforth*,

JJ., concur. *Earl and Finch, JJ.*, dissent, on the ground that the defect in the brake was not the proximate cause of the accident and defendant was not bound to anticipate such an accident from such a cause, and was not chargeable with culpable neglect and that the accident was caused by co-employees.

WILL. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

In re probate of will of Patrocles Blaker, deceased.

Decided Dec., 1887.

Where a will is not unreasonable in its provisions, though some of the evidence excluded was admissible, a decree admitting the will to probate will not be set aside for such error unless the court can see that the contestant was prejudiced by the rulings.

An inquisition taken upon a commission of lunacy is not admissible in evidence as against the proponent of a will unless it embraces the time in which the will was made within that in which the testator was found to be of unsound mind.

A will of the use or income of real and personal estate of the testator to his widow during life, and after her death the use of it to her seven children during their lives, share and share alike, and after the death of each child the share of such deceased to be equally divided between the grandchildren of the testator then living, is valid, and does not operate as an unlawful suspension of alienation, or of the absolute ownership of the property real or personal.

Patrocles Blaker made a will August, 1880, and died at the age of eighty-six Nov., 1886. By this will he gave his wife the use and income of all his property during

her life, and after her death the use of it to her seven children during their lives, share and share alike, and after the death of each child he directed the division of the share of such deceased child equally between his grandchildren then living. The probate was contested by one of the children of the testator mainly on the ground of want of testamentary capacity, and that the power of alienation of the real estate and the absolute ownership of the personal estate were unlawfully suspended.

The Surrogate's Court of Monroe County admitted the will to probate and the contestant appealed.

William Butler Crittenden, for applt.

H. G. Pierce, for respt.

Held, That the will was not unreasonable in its provisions in view of the amount of the testator's property, which is said to have amounted to about \$15,000, and though there were several exceptions taken by the contestant to the exclusion of evidence, and some of the evidence so excluded was admissible, but in most instances evidence similar in character to that so rejected was introduced, after a careful examination of all the evidence we think the contestant was not prejudiced by the rulings, and therefore the decree should not be reversed for such error. Code Civ. Pro., § 2545; 104 N. Y., 75.

That the inquisition taken upon the commission issued to inquire into the lunacy of the testator was properly excluded, because it did not embrace, within the time in

which he was declared to be such, a period earlier than April, 1883, nearly three years after the will was made. 6 Wend., 497; 8 Hun, 327.

That there was no unlawful suspension or alienation, or of the absolute ownership of the property real or personal. The widow takes the use during her life. The children take the use as tenants in common, not as joint tenants during their lives, and on the death of each of the latter the portion in which he took a life estate by the will is relieved from the suspension, and vests in the grandchildren, and thus no portion of this estate is within the limitation and absolute ownership for a longer period than two lives in being at the time of testator's death.

Decree affirmed.

Opinion by *Bradley, J.; Smith, P.J., Barker and Haight, JJ.*, concur.

ASSIGNMENT. COMPOSITION.

N. Y. COURT OF APPEALS.

White, *applt.*, v. Kuntz et al., *respts.*

Decided Dec. 13, 1887.

While a secret agreement with one of several creditors as an inducement to procure his signature to a composition agreement that he shall receive a greater amount for the notes than their face is fraudulent and void, and will avoid the composition as to all innocent parties thereto, the party with whom such agreement is made cannot be heard to allege that the composition is invalid or be allowed to recover such increased amount, but he is to be held to his remedy on the composition notes.

This action was brought against J., and L. F. K., and M. K., about Jan. 1, 1882. An amended complaint was served in March, 1884. The complaint alleged that when the action was commenced and for five years before, plaintiff was a malster and J. and L. F. K., were brewers in the city of New York; that prior to Jan. 3, 1881, plaintiff sold to J. and L. F. K., a large quantity of malt and received in payment therefor two notes, one dated Dec. 7, 1880, for \$5,446.84, and one dated Jan. 3, 1881, for \$12,714.80, each payable four months after date. These notes were not paid at maturity and in April, 1881, J. and L. F. K., made an assignment for the benefit of their creditors, to their father, M. K., that afterwards certain of their creditors executed a composition agreement whereby they agreed to accept in full discharge 33½ cents on the dollar of their claims, to be paid in notes of J. and L. F. K., payable in four equal instalments in 2, 3, 4 and 5 years from May 2, 1881. These notes were to the order of M. K., and were to be indorsed by him and the delivery of them was to operate as a complete release and discharge of all the demands of the creditors signing the agreement. In pursuance of said agreement four notes each for \$1,513.47 were executed and delivered to plaintiff and indorsed by M. K. Prior to the signing of the composition agreement on April 28, 1881, and, to induce plaintiff to sign the same M. K., signed, sealed and delivered to plaintiff,

an agreement to purchase from him the four composition notes for \$10,000 payable \$2,500 on the first days of June, Sept, and Dec., 1881, and March 1882; that on July 19, 1881, plaintiff tendered the composition notes to M. K., and demanded payment of the \$2,500 payable, June 1, 1881. M. K., refused payment claiming that his agreement was null and void. The complaint also alleged that other creditors were induced to sign the composition agreement by promises on the part of M. K., to pay them a larger percentage than one-third, and that J. and L. F. K. knew of such promises which were fraudulently concealed from plaintiff. The complaint was demurred to as not stating a cause of action against the defendants or any of them, and the demurrer was sustained.

William Barnes, for applt.

A. Blumensteil, for respts.

Held, No error; that the agreement on the part of M. K., with plaintiff was fraudulent and void, and the composition agreement as to all the innocent parties thereto, was void, and they were left with the right to enforce their original claims the same as if they had never signed it, 1 Hilton 514, 519; 4 Sandf., 79, 83; 10 Wend., 474, 479; but plaintiff not being an innocent party, but having by his signature to the composition induced innocent creditors to sign in the belief that all creditors were to be treated alike, perpetrated a fraud and should be held to the composition and his remedy

upon the composition notes, 16 A & E. N. S., 690, and he is not in a position where he may be permitted to allege that the composition agreement is invalid.

Judgment of General Term, affirming judgment on order sustaining demurrer, affirmed.

Opinion by *Earl, J.* All concur.

AGENCY. EVIDENCE. RES GESTÆ.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Miles Riggs et al., respts., v. D. Rollo Warner, applt.

Decided Dec., 1887.

Where defendant and his father lived on a farm which was owned by the former, and defendant purchased goods from time to time upon credit of plaintiffs, a portion of which were purchased by the father and hired man, and defendant had made payments of money and produce on the same, and the transactions between plaintiffs and defendant took the form of an account on the books of plaintiffs, and subsequently defendant leased the farm stock and utensils to his father and moved from the farm, and his father conducted the business of the farm in apparently the same manner as formerly, and continued to purchase goods of the same general character of plaintiffs, who without notice of the change of the relations between the father and the son in respect to the business of the farm charged such goods so purchased to defendant in his account. *Held*, That defendant by reason of want of notice of revocation of agency was liable to plaintiffs for goods so furnished his father: that knowledge that defendant had moved away from the farm did not necessarily require the conclusion that plaintiffs had notice of the change of relations.

Statements made by defendant's father when plaintiffs were figuring up the ac-

count, and drawing up a note for the father to procure his son's signature to, are competent as a part of the *res gestæ*.

Appeal from judgment of Wayne County Court affirming judgment rendered by a justice of the peace.

Action upon an account for goods sold by plaintiffs to defendant. It appeared that in 1882 and into Oct., 1883, defendant and his family resided on a farm owned by him, and his father resided upon the same farm. During that period defendant bought feed and grain of plaintiffs and the dealings of plaintiffs and defendant went into an account upon plaintiff's books, and payments made in cash and produce were credited from time to time to defendant's account. The purchases on account were sometimes made by defendant, and at other times by his father and the hired man. In Oct., 1883, defendant moved from the farm to another town, but left on it his farming utensils and stock, and his father remained on the farm. After defendant removed from the farm, flour, feed and grain, etc., from time to time were purchased, which were called for by his father and the hired man, and these goods were entered by plaintiffs in the account upon their books with defendant. The controversy relates to that portion of the account for goods sold after defendant moved from the farm; and he and his father testify that after that time the latter had no authority to get goods upon the account or credit of defendant; and the latter says he had leased the farm and stock upon it to his

father, and had nothing to do with its operation. No notice appears to have been given to plaintiffs of any change in the relations between him and his father in the business of the farm unless it was permitted by knowledge of the fact that defendant had left the farm.

P. Chamberlin, Jr., for applt.

S. B. McIntyre, for respt.

Held, It appears that plaintiffs treated defendant as principal, and we think that knowledge of the fact that defendant had left the farm did not necessarily require the conclusion that plaintiffs had notice of the change of relations between the father and the son, as defendant's stock and utensils remained and the stock was maintained and utensils were used on the farm apparently as before that time; and for want of notice of revocation of the relation of the father as agent of defendant plaintiffs were permitted to assume it continued after, as it had before, defendant ceased to reside on the farm; therefore defendant was chargeable upon account for the goods obtained apparently through the same agency, in the same line of trade for use upon the farm as before, and upon the faith that they were ordered and obtained upon his account and credit. 66 N. Y., 23; *id.*, 301.

That the transaction between the father and plaintiffs at the time the account was figured up was not incompetent; and what was said at the time having relation to it was part of the *res gestæ*.

Judgment affirmed.

Opinion by *Bradley, J.; Smith, P.J., Barker and Haight, JJ.* concur.

VENDOR AND VENDEE.

N. Y. COURT OF APPEALS.

Windmuller et al., respts., v. Pope et al., applts.

Decided Dec. 6, 1887.

Where the vendee serves notice on the vendor that he will not receive or pay for the goods the vendor may immediately sue for breach of the contract without tendering performance or waiting for expiration of the time fixed by the contract.

This was an action to recover damages for the renunciation of a contract for the purchase of iron to be imported by plaintiffs. The contract was made in Jan., 1880. On June 12, 1880, defendants notified plaintiffs that they would not receive or pay for the iron, and on the next day informed them that if they brought the iron to New York they would do so at their own peril, and advised them to stop at once attempting to carry out the contract, so as to make the loss as small as possible. Plaintiffs sold the iron to another party.

Carlisle Norwood, for applts.

Bernard Roelker and Cephas Brainerd, for respts.

Held, That plaintiffs were justified in treating the contract as broken at that time and were entitled immediately to bring an action for its breach without tendering the delivery of the iron or waiting the expiration of the period of performance fixed by the

contract, nor could defendants retract their renunciation. 43 N. Y., 231; 61 id., 362; 101 id., 12; 2 El. & Bl., 678; 17 Ad. & El., 127; 19 Ia., 179; Benj. on Sales, §§ 567, 568.

Also held, That in computing the damages defendants should be credited with the difference between the freight to New York, fixed by the charter party, less the sum it cost plaintiffs to be released from the charter, and also with any other expenses the plaintiffs would naturally have incurred in performing their contract to deliver the iron in New York.

Judgment of General Term, affirming judgment on verdict for plaintiffs, affirmed.

Per curiam opinion. All concur.

EXECUTOR. ACCOUNTING.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

In re estate of Edward O'Neil.

Decided Nov., 1887.

After a decree had been entered in a final accounting an executor applied to the successor of the surrogate who made the decree and stated by petition that he had not been allowed commissions on a certain sum in his account. The surrogate opened the decree and allowed the commissions. *Held*, That no case was made for opening the decree.

The will of the testator directed the executor to invest \$2,500, and pay the interest semi-annually to Mary O'Neil during life, and upon her death to her daughters, Mrs. Lake and Mrs. Gunn. The executor did not invest the principal, but used it. He paid the interest to

Mary O'Neil from 1868 to her death in 1875, and in the same year paid the principal to Mrs. Lake and Mrs. Gunn. Upon his final accounting in Oct. 1886, the surrogate then in office found the executor had \$2,096.43 to distribute among residuary legatees and that of this then should be paid to Mrs. Lake and Mrs. Gunn \$59.72 each. In April 1887 the executor presented a petition to the present surrogate alleging that no allowance was made him in the decree for commissions on the \$2,500. The surrogate opened the decree and allowed commissions equal to the sums to be paid Mrs. Lake and Mrs. Gunn and effect the sums against their shares. They appeal.

John D. Echert, for applts.

Bernard & Fiero, for resp't.

Held, Error. No case was made to open the decree. Why the commissioners were not allowed in the decree does not appear in any way. Nor does it appear upon what sum the executor was allowed commissions, if any. The Code Civ. Pro., § 2481, sub. 6, directs a surrogate not to open or modify a decree except "in a like case and in the same manner as a court of record and general jurisdiction exercises the same powers." Such a power should be carefully exercised and its inconsiderate use has been corrected. 98 N. Y., 434; 109 id., 206; 41 Hun., 463; 24 id., 1. No court of record would permit its decree to be opened upon the suggestion of one of the parties that some item of credit was not allowed him. The execu-

tor has had his day in court and to get another he must show that it was not his fault that he did not improve it.

Order reversed.

Opinion by *Landon, J.*; *Parker* and *Fish, JJ.*, concur.

SURROGATES. BOND.

N. Y. COURT OF APPEALS.

The People ex rel. Nash, surrogate, *resp't.*, v. Faulkner, exr., et al., *applts.*

Decided Dec. 6, 1887.

The sureties on a surrogate's bond are not liable for moneys deposited by him in good faith with a banker who is in good credit and standing at the time, but who is afterward found to be insolvent.

Reversing S. C., 28 W. Dig., 881.

One F. was county judge and surrogate of Livingston County from Jan. 1, 1872 until Aug. 9, 1878, when he died. During his term of office proceedings to sell the real estate of an intestate were instituted. The proceeds realized from the sale were paid into F. as surrogate and deposited by him in good faith in the bank of C., who was a banker in good standing and credit doing a general banking business. The deposit was made in April, 1877. On Nov. 1, 1877, while proceedings to establish the claims of creditors on the money so deposited was still pending, C. failed and made an assignment for the benefit of his creditors. F. died before a payment was made by the assignee and after such payment an order was made at a Special Term of the Supreme

Court on an *ex parte* application by the relator authorizing him to prosecute defendants as sureties upon the official bond of F. and this action was brought to recover the value of the sum deposited.

Charles J. Bissill, for applt.

James Wood, for respt.

Held, That the complaint should have been dismissed, F. having deposited the money in good faith and without negligence and with a banker in good standing and credit at the time the money was deposited. 25 Wend., 440; 7 Hill 583.

Muzzy v. Shattuck, 1 Den., 233, distinguished and explained.

The surrogate was not a public officer to receive or disburse public money, and it was not even his main duty to receive, keep or disburse the money of individuals. His principal duties were judicial in their nature and any duties he had in reference to moneys which came into his hands were incidental to his judicial duties; that this money came lawfully into the possession of the surrogate and there is nothing in the statute which makes him an absolute debtor for it. It was his duty to keep it and when the time came for distribution to distribute it among the creditors. It might remain in his custody for a long time until the claims of creditors had been established and all litigation in relation to them and the money ended. The law did not provide the surrogate with a safe or other place of deposit, but left it to his own good sense and judgment to determine how he should

safely keep and care for the money. •

Also held; That there is no statute in this State which makes the surrogate liable under the facts proved here; that there is nothing in the policy of the law which requires that the surrogate should be absolutely responsible for the money. 2 R. S. (6th Ed.), 118; 3 id., 115; Story on Bail., § 620; 1 Perry on Trusts (3d Ed.), § 443; 2 Williams Executors (5th Am. Ed.), 164; 3 Redf., on Wills 394.

The surrogate's bond was for the faithful performance of his duties and the faithful application and payment of all moneys that might come into his hands.

Held, That this bond did not enlarge the surrogate's statutory liability; it was simply designed to enforce and secure the faithful discharge of his duties, and any defence the surrogate would have had when called to account for the money which came to his hands is available to his sureties.

Judgment of General Term, affirming judgment for relator, reversed, and new trial granted.

Opinion by *Earl, J.* All concur.

INJUNCTION. NUISANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

James Vick et al., respts., v. The City of Rochester, impl'd., applt.

Decided Dec., 1887.

There are cases when a party will be denied the right to an injunction when it

appears that by reason of gross laches, or delay in applying for the restraining mandate, large expenses have been incurred and great loss or injury would result to the party who has thus been permitted to proceed without interruption when such party has proceeded in good faith founded upon a belief of his right to so proceed.

When interests are involved concerning the public, if it appears that the defendant has taken any steps to acquire the right to do that which is sought to be restrained, and which would probably result in acquiring such right, some reason would appear for the denial of an injunction, or of suspending its operation for a reasonable time.

The provisions of § 605, Code Civ. Pro., do not apply to local officers in the performance of a duty imposed on them by the order of the governor of the State directing them to abate a nuisance, and in such performance, neither the order nor the statute confer the right to impose a burden upon lands of another, without acquiring the right to do so in the manner provided by law.

Appeal from order so far as it denies motion to vacate an injunction.

The action was brought against the city of Rochester and Nicholas L. Brayer to restrain them from diverting into East avenue sewer of the city the water of Thomas creek and the sewage of Monroe avenue sewer or either through the first named sewer into and through a ditch upon the lands of the railway company to that creek, and an injunction was granted *pendente lite*. The motion of the city of Rochester to dissolve the injunction was granted as to all the plaintiffs except the railroad company and as to it this motion was denied. From such denial the city appeals.

The outlet of East avenue sewer

is into an open ditch on the lands of the RR. Co. in which the sewage passes into Thomas creek at the point where the railroad crosses it in the town of Brighton. The city was proceeding by means of its contract with defendant Brayer for the performance of the work to carry the sewage of the Monroe avenue sewer through the same ditch by connecting it with the East avenue sewer. To prevent that, this action was brought and the injunction obtained. The fact that the city had no right by means of tributaries to the East avenue sewer to increase the flow of sewage through this ditch was determined by a judgment in a former action brought by the RR. Co. against the city.

It appears that complaint had been made to the governor of the State that the discharge of the sewage from Monroe avenue sewer into Thomas creek was a nuisance, pursuant to Laws of 1880, Chap. 322, § 8, as amended by Laws of 1882, Chap. 309, and the governor had made an order to the effect that it was a public nuisance, and directing the mayor and common council to abate it in the manner specified, and that the common council by way of compliance with the order passed the required resolution, and the executive board proceeded to and did let the contract for the work requisite to accomplish it to Brayer, who was proceeding with the work when its progress was restrained by the injunction. It is contended that the plaintiff company was advised of the purpose of the city to let

the contract and do the work and of its progress, and that after the large expense which was incurred in that behalf the plaintiff should not be permitted to arrest its progress to completion by injunction.

Henry S. Sullivan, for applt.

A. H. Harris, for respts.

Held, That the judgment in favor of the RR. Co. against the city would seem to be and is sufficient to support the order denying the motion to vacate the injunction unless other considerations are such as to permit or require a different conclusion.

That there may be cases in which a party will be denied the right to an injunction and put to his action at law for damages by reason of delay in applying for the restraining mandate, when by reason of such neglect large expenses have been incurred and great loss or injury would result to the party who has thus without interruption been permitted to proceed, but those cases are cases where he has proceeded in good faith founded upon the belief of his right to do so, by reason of which the injunction would operate oppressively, inequitably or contrary to justice, and gross laches may also furnish a reason for its denial. Story Eq. Jur., § 959; 3 Abb. N. C., 347, and cases there cited. This case does not seem to come within those referred to; defendant had by the former action and judgment been advised that it had no right to make the diversion into and through this ditch, and the RR. Co. had objected to the increased flow of sewage into and through

it, which the proposed connection of the Monroe sewer would produce; nor does it appear that the plaintiff in view of the situation is chargeable with laches. The time which had been given to the work or how far it had progressed is not stated by the affidavits; and it cannot be assumed that it was substantially accomplished when the injunction was served.

That, in view of the interests involved concerning the public if it appeared that defendant had taken any steps to acquire the right to use the ditch for the purposes in view, and which would likely result in obtaining it, some reason would appear for denial of the injunction or of suspending its operation for a reasonable time, with a view to that end, but nothing in that respect appearing, and the plaintiff having by a former adjudication obtained a final judgment restraining defendant from doing what in practical effect, although not in fact, embraces the subject of the controversy in this action it is difficult to see any substantial reason for the denial of the injunction.

That the provisions of Code Civ. Pro., § 605, "Where a duty is imposed by statute upon a State officer or board of State officers an injunction order to restrain him or them from the performance of that duty or to prevent the execution of the statute, shall not be granted except by the Supreme Court at General Term thereof," does not apply to this case. The construction for relief in the manner prescribed by the order of the gov-

ernor, although directed by such order to be done, is not we think within that provision of the Code. It is not a duty imposed upon any State officer, nor are the mayor and common council employed by any such officer to perform the duty. While the order was made pursuant to the statute the duty so far as it was such devolved upon the local authorities named to abate the nuisance; and in doing it neither the statute nor the order of the governor conferred the right to impose a burden upon the lands of another without acquiring the right to do so in the manner provided by law.

Order affirmed, without prejudice to the right to renew the motion.

Opinion by *Bradley, J.; Smith, P.J., Barker and Haight, JJ.*, concur.

GIFT. ESTOPPEL. RESCISSION.

N. Y. COURT OF APPEALS.

Francis, *applt.*, v. The N. Y. & Brooklyn Elevated RR. Co., *respt.*

Decided Jan. 17, 1888.

Plaintiff held stock of defendant which he surrendered and had transferred to his three children, and took certificates which he kept in his safe. *Held*, That plaintiff could not rescind such transfer; that defendant was not restored to its original position, but was left subject to a claim by the infants that the stock was theirs and to litigation.

He who would rescind must do so wholly and leave no right flowing from him outstanding which imperils the completeness of the rescission.

Plaintiff granted to defendant

an easement or right of way abutting on his property. In consideration thereof defendant issued to him a certificate for 250 shares of its capital stock. He surrendered this certificate to defendant, and requested the issue of three new certificates to his infant children, the eldest of whom was four years old and the youngest two months. The stock was transferred on the corporate books to the infants and the company's formal certificate of their ownership delivered to plaintiff. Upon the stock book plaintiff signed three receipts in the name of each of his children for the stock so issued, and stated that he kept the certificates in his safe and said nothing to the children about them. Plaintiff now seeks to rescind his conveyance to defendant, having offered to return the stock certificates.

William J. Gaynor, for *applt.*

Robert Ludlow Fowler, for *respt.*

Held, That as between plaintiff and defendant, the former having induced the latter to recognize and admit the ownership by the children and become unable as against them to deny such ownership, the transfer on defendant's book and the issue of the new certificates was a continuing affirmation by defendant of ownership of the stock by the infants named in the certificates, and opened the door to an estoppel in behalf of claimants acting in good faith. While the surrender by plaintiff of the three certificates might tend to prevent any transfer in good faith from the children and make difficult an estoppel in behalf of

others, yet defendant is not restored to its original position, as, if it accepted the tender made and restored what is now sought to be recovered, it would still be exposed to a claim of the infants that the stock was theirs, and be compelled to bear the risk of the inquiry whether the gift was executed and complete, and would be exposed to litigation over that question and under circumstances in which the father, however unwilling to admit a gift, might become rather willing than otherwise, and confess some intention or purpose in that direction.

He who would rescind must be said to do so wholly and leave no right flowing from him outstanding which imperils the completeness of the rescission.

Judgment of General Term, reversing judgment for plaintiff, affirmed.

Opinion by *Finch, J.* All concur.

PLEADING. VERIFICATION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Leopold Beyer et al., *respts.*, v. Charles H. Smith et al., *appls.*

Decided Nov., 1887.

Where a pleading is verified by an agent of the party pleading, the nature of the agency need not be set out in the verification.

The court will not set aside a pleading even though it appear that the agent could not truthfully have verified it.

Appeal from order denying motion to compel plaintiff's attorney to receive an answer. The answer

had been returned as defective in its verification. The complaint alleged that the defendant Smith being insolvent did by fraudulent representations to plaintiff Beyer obtain goods of his firm in March, 1887, and that in May, 1887, Smith turned over the goods to defendant Maurice Wilson who had knowledge of the fraud. The answer of Wilson denied knowledge or information sufficient to form a belief of the fraudulent procurement; denied that defendant had knowledge of the fraud or took the goods with such knowledge and avers that she took the goods in good faith and for value. The verification in question is by one Joseph C. Wilson, who "being sworn says that he is the agent of the above named defendant" and proceeds in the usual form. It continues "that the reason this affidavit is made by deponent and not by said defendant is that said defendant is without the State and not within the county now; that the sources of deponent's knowledge and the grounds of his belief as to the allegations of said answer are obtained from papers of said defendant in his custody relating to the matters in issue and from conversations had with said defendant relating thereto."

Geo. C. Sawyer, for applt.

H. D. Ellsworth, for resp't.

Held, That the verification was sufficient. The agent may make it when the party is not within the county. Code Civ. Pro. § 525. The Code does not prescribe in what respect the agency must ex-

ist nor that the nature of it must be stated. Nothing in the answer is stated upon information and belief and hence the agent has sworn that every allegation is true to his own knowledge. Code § 524. It is probable that the agent has sworn that to be the time of his own knowledge which he could not know to be true. But the Code has been complied with and he cannot set aside the verification because it fails to command confidence.

Order reversed.

Opinion by *Landon, J.*; *Parker*, and *Potter, J.J.*, concur.

APPEAL.

N. Y. COURT OF APPEALS.

Hayes, *respt.*, v. Nourse, *applt.*

Decided Dec. 23, 1887.

A party against whom judgment has been rendered is not prevented from appealing to the Court of Appeals by the fact that he has paid the judgment unless the payment was made by way of compromise or with an agreement not to appeal.

This was a motion to dismiss an appeal on the ground that it was taken after the judgment appealed from had been satisfied of record. It appeared that a judgment was recovered by plaintiff against defendant in the Court of Common-Pleas in the city of New York on April 4, 1887, for \$3,528.26, from which defendant appealed to the General Term of said court, where the judgment was affirmed, and on June 10, 1887, a judgment of affirmance thereof, and for \$84.24

costs of said appeal, was entered. On June 15 defendant paid both of said judgments, and applied to plaintiff's attorney for and received satisfaction pieces thereof, which he on the same day filed and caused said judgment to be satisfied of record. No process had been issued or proceeding taken to enforce payment of the judgments. On Sept. 27, 1887, defendant served notice of appeal to this court.

Arthur P. Hilton, for motion.

Strong & Cadwallader, opposed.

Held, That the motion should be denied; that a party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment unless such payment is by way of compromise or with an agreement not to take or pursue an appeal. 1 Code Rep. N. S., 415; 5 How. Pr., 201; 42 Barb., 441; 8 Cow., 326, 328.

Motion denied.

Opinion by *Danforth, J.* All concur.

QUO WARRANTO. VENUE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People, *respt.* v. Thomas C. Platt., *applt.*

Decided Nov., 1887.

The complaint alleged that defendant was nominated and confirmed as quarantine commissioner and entered on his duties; that it was requisite that he should be a resident of the metropolitan district, when appointed or during his incumbency or both, and that he never was

such resident; also that his oath was improperly taken and filed. It demanded judgment that defendant be declared to have usurped the office, that the latter be declared forfeited, that defendant be ousted and that he pay a fine of \$2,000. *Held*, That the action was in the nature of a *quo warranto* and that the attorney general might lay the venue in any county. That it was not an action to recover a fine or penalty.

Appeal from order denying motion to change the place of trial from Albany to New York.

The complaint alleged that on the 29th day of Jan., 1880, a vacancy existed in the office of quarantine commissioner and that on that day defendant was nominated and confirmed; that he assumed office and has ever since continued therein. It recites statutes tending to show that the incumbent should at the time of his appointment or during his continuance in office, or both, be a resident of the metropolitan district; it alleges that he has at all times been a resident of Tioga county. It also alleges that his oath of office should have been taken before certain officers and should have been filed in the N. Y. county clerk's office and that it was taken before a notary public and filed in Albany in the secretary of state's office. Judgment is demanded that defendant be declared guilty of usurping the office; that he has forfeited the office; that he be ousted therefrom and pay a fine of \$2,000.

MacFartland, Boardman & Platt, for applt.

D. O'Brien, Atty Gen, for the people.

Held, That the motion was

properly denied. The action is in the nature of a *quo warranto* and the attorney general may elect where it shall be tried. Code Civ. Pro., § 1948. It is not an action to recover a penalty or forfeiture imposed by statute. Code Civ. Pro., § 983. It is an action to declare a forfeiture, and if declared the office will not be recovered but will be vacated. This action to declare a forfeiture proceeds upon the ground that defendant being lawfully in office by the defect in the oath forfeited his lawful right so to continue. 42 Hun., 384. The thing counted upon in the defect in the title.

This is not an action to recover a fine or penalty. No facts are stated constituting a cause of action for the \$2,000. The people seek to have the court in the exercise of its discretion impose a fine under Code Civ. Pro., § 1956. The complaint seeks to have defendant ousted upon one of three grounds; either because as a non-resident he was not eligible to appointment, or because by not residing in the district during his incumbency he lost his right to continue therein, or because by the defect in the oath he forfeited the office. Therefore in the first case defendant is charged to have been a usurper and in the second and third cases he is charged to be the holder of the office by a defeasible title. We think therefore the action is in the nature of a *quo warranto*.

Order affirmed.

Opinion of *Landon, J.*; *Potter* and *Parker, JJ.*, concur.

MORTGAGE. EVIDENCE.**N. Y. COURT OF APPEALS.**

Briggs, applt., v. Langford et al., respts.

Decided Dec. 20, 1887.

In an action to restrain the foreclosure of a mortgage, brought by a grantee of the land, on the ground that the grantor represented that the land was free and clear, it is admissible to show that the mortgage was given for the purpose of defrauding the creditors of the mortgagor and on no other consideration; that if it was without consideration it could not be enforced against the mortgagor, and the defense was available against the assignee of the mortgage, although he is a *bona fide* purchaser.

Reversing S. C., 20 W. Dig., 563.

This action was brought to stay the foreclosure of a mortgage by advertisement. Plaintiff purchased the land in question of one D., paying full value for it upon the assurance of D. that it was free from incumbrances. D. is dead and his estate is insolvent and there is no available remedy in plaintiff's deed. Upon the trial plaintiff offered to show that the mortgage was given for the purpose of defrauding the creditors of D., the mortgagor, and upon no other consideration. This offer was rejected.

Wm. H. Henderson, for applt.

Worthington Frothingham, for respts.

Held, Error; that if the mortgage was without consideration it could not be enforced against D., although it was given to cover up his property and defraud his creditors. 24 Pick., 141.

Also held, That the defense of want of consideration is equally

available against the assignee of the mortgage, even if he is a *bona fide* purchaser and stands in respect to the security in place of his assignor. Jones on Mortgages, § 843; 22 N. Y., 535.

Judgment of General Term, affirming judgment for defendant dismissing complaint, reversed, and new trial granted.

Opinion by *Andrews, J.* All concur.

POLICE.**N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.**

The People ex rel., William Decker v. The Police Commissioners of Albany.

Decided Nov., 1887.

The board of police commissioners of the city of Albany have power under the acts creating it to fix the salaries of patrolmen at any sum under \$900.

It may also under its powers to regulate and govern the police force, establish a "veteran" grade of men, who may be paid a smaller sum than other patrolmen in active service.

Appeal from order denying a motion for a mandamus to direct defendants to audit relator's monthly salary as a patrolman at \$75. Up to Feb. 1, 1887, his salary was \$75 per month and was then reduced to \$50. Chapter 77, Laws of 1870, amended by Chap. 298, Laws of 1885, creates defendants and confers upon the management custody and control of the police force. Section 38, provides that "each patrolman of the police force shall receive an annual salary of not over \$900." This section amended by Chap. 443, Laws

of 1886, fixes the salaries of the officers connected with the force, a few at specific amounts and the others, including patrolmen, at not over certain sums. Defendants are given power to fix the salary of their clerk and may pay to one assigned as a detective, sums not exceeding over \$300 in addition to the annual salary. Chapter 298, Laws of 1883, provides that the chamberlain is to pay any claim, debt or demand on the warrant of a city board.

E. Countryman, for applt.

D. Cady Herrick, for respts.

Held, That the mandamus was properly refused. No legal right to the full sum of \$900 was shown. The statute say the relator shall receive an annual salary of not over \$900. This is the maximum. We think the statute gives the board power to fix the salary, although there is no express power conferred. But the intention is clear. The board may fix the salary of it clerk and it has under the act full power to regulate and govern the police force. Salaries are payable on their audit and warrant and they could not draw a warrant without fixing the sum. The statute should be rather to accomplish than defeat the purpose of its framers. It is further said that if the board had power to fix the salaries it could not discriminate in the salaries of policemen engaged in active service. It seems that the board established a "veteran" grade and assigned relator to it. These were men who had served more than ten years. We think the board could

do this within its powers to regulate and govern the force.

Order affirmed.

Opinion of *Landon, J.*; *Fish* and *Parker, JJ.*, concur.

EVIDENCE. NEGLIGENCE.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

Esther A. Record, respt., v. The Village of Saratoga Springs, applt.

Decided Nov., 1887.

After testimony of an attending physician is excluded under § 884, it is too late on appeal for defendant to object that the rule did not apply because the physician was not examined as to whether he was "duly authorized to practice." The respondent is now entitled to the presumption that he was so authorized.

Where the physician called by defendant had been in consultation with another physician who afterwards attended plaintiff and plaintiff and the second physician testified to plaintiff's condition, *Held*, that plaintiff did not thereby waive her right to object to the testimony of the first physician.

Plaintiff gave no expert testimony as to her probable future condition, but testified to the present condition, *Held*, That a change was correct which left the matter to the jury, also instructing them to consider that plaintiff might have given expert testimony as to her future condition but had not done so.

Action for injuries sustained, as alleged, by defendant's negligence. Defendant called a physician, Dr. Grant who testified he was a regular practicing physician and surgeon and had attended plaintiff from Oct. to Jan. Defendant sought to show by him plaintiff's condition during the period. This was objected to under Code Civ. Pro., § 834, and excluded. De-

fendant now says the section does not apply because Dr. Grant did not produce his license and was not examined as to his being "a person duly authorized to practice physic or surgery." Plaintiff had a verdict.

W. H. McCall, for applt.

C. M. Davison, for resp't.

Held, That the objection was untenable. Plaintiff is now entitled to the presumption that the physician was duly authorized to practice. If the objection had been taken on the trial to the sufficiency of the proof sufficient proof might have been given.

But it appears that plaintiff had another attending physician, Dr. Hall, and that she called him to testify as to her condition and that he consulted with Dr. Grant on one occasion. On cross examination Dr. Hall was examined by defendant as to the condition of plaintiff and as to what took place on the occasion. Defendant sought to examine Dr. Grant on the same topics. This was objected to and sustained. Defendant now urges that by examining Dr. Hall and by testifying herself plaintiff expressly waived her privilege to present Dr. Grant's disclosure. We think not. Her testimony and the cross examination of Dr. Hall did not waive her objection to the testimony of Dr. Grant.

Plaintiff gave no testimony as to the probable duration or effect of her injuries. The court said that in computing damages as to the future the jury must judge from the evidence what it would

be and that they were to consider in that connection that she might have given evidence as to her probable future condition and had not done so. Defendant asked the court to charge that she could not under the circumstances recover any damages for her future condition. The court declined. We think the charge correct. Plaintiff had testified to her condition and the court could not charge that she was entitled to no damages for the future. That was for the jury to decide. Plaintiff was not bound to call experts as to this.

Judgment affirmed.

Opinion by *Landon, J.*; *Parker* and *Fish, JJ.*, concur.

REFERENCE. WAIVER.

N. Y. COMMON PLEAS. GENERAL TERM.

William McAllister, resp't., v. Joseph S. Case et al., applts.

Decided Jan. 3, 1888.

A party to a reference who is aware of irregularities in the conduct thereof, before the making of the report, *e. g.*, in the receipt of testimony and hearing of argument in the absence of and without notice to such party, and who, notwithstanding such knowledge, fails to object to such irregularities till the making and filing of an adverse report, will be deemed to have waived such irregularities.

Appeal by defendant Morris from order made at Special Term denying his motion to vacate and set aside order of reference and referee's report, on the ground of irregular and improper conduct of the referee in receiving evidence, and hearing counsel for some of the

parties after the case was closed, and in the absence of and without notice to appellant.

The report of the referee was filed on July 15, 1887, in which he found in favor of plaintiff and other lienors who had filed notices of pendency of action, with costs against appellant. On July 20 appellant made his motion to vacate the order of reference and set aside the report. It appeared that after the referee had received the proofs and heard the arguments complained of, and before he had rendered his decision, appellant's attorney had notice of the irregular proceedings, but took no action until the report against his client was filed.

N. K. Hall, for appls.

B. Metzger, for respt.

Held, That although it does not appear that appellant here was injured by the introduction of the merely formal proof of the filing of notices of pendency of action, and the argument of the questions arising upon the non-filing of such notices by certain lienors (which questions were ultimately decided in his favor), and the argument of the question of costs as between the lienors and the owner, yet it was undoubtedly irregular and improper for the referee to receive any proofs and hear any argument after the case was closed without notice to him; and under ordinary circumstances the report would have to be set aside and the reference vacated for such irregularity; but it appears that the appellant here had notice of the irregularity com-

plained of and made no objection until after the referee rendered his decision. This is a waiver of objection. After he was apprised of the proceedings of the referee, if he disapproved of them he should have objected. "He ought not to be permitted, after having lain by and taken the chance of a favorable award, to object when he finds the award against him." 62 N. Y., 392; 29 Hun, 17; 66 How., 302.

Order affirmed, with costs.

Opinion by *Daly, J.*; *Larremore, Ch. J.*, and *Van Hoesen, J.*, concur.

SURPLUS PROCEEDINGS. DOWER.

N. Y. COMMON PLEAS. GENERAL TERM.

The N. Y. Life Ins. Co. v. Ferdinand Mayer et al.

Decided Dec. 5, 1887.

A judgment against a husband recovered after marriage is in surplus proceedings a subordinate lien to the wife's inchoate right of dower, and such right of dower may be enforced as such prior lien in said proceedings, though the wife joined in the execution of the mortgage foreclosed, which contained a clause stipulating that the surplus, if any, should be paid to the husband, or those claiming under him.

Appeal from order of Special Term confirming report of referee appointed to determine what claims of creditors are liens upon the surplus moneys arising from the foreclosure of a mortgage in the above action and their priorities.

The liens sought to be enforced were divers judgments recovered against the owner of the equity of

redemption, subsequent to his marriage, and the inchoate right of dower of his wife, who had joined in the mortgage foreclosed herein, and which was allowed by the referee as prior to said judgments. The case below was reported in 19 Abb. N. C., 92.

Henry A. Root, for applt.

Simpson & Werner, for respt.

Held, That the principles announced by the court below should be affirmed.

The only question upon which the judge at Special Term expressed any doubt was that concerning the dower of Regina Mayer, the mortgagor's wife. This matter he sent to the General Term for final decision, confirming, however, the report upon that point as upon all others.

That in this he did not err. The wife of a mortgagor is endowable of the surplus moneys, even though she has joined in the mortgage. Dower is justly one of the estates most favored by the law, and the tendency of adjudication has always been to preserve it for the wife if this may be done on any tenable theory. 4 Harrington, 111. The law is that a judgment against a husband recovered after marriage will be a lien, not superior, but subordinate to the wife's inchoate right of dower. *Id*.

The surplus moneys, according to fiction of law, continue land, and subject to its incidents after the sale, and there is every reason why dower should attach thereto in the same manner that judgments do. Nor is there embarrassment in the fact that the clause

in the mortgage in which the wife joined stipulated that the surplus, if any, should be paid to the husband or those claiming under him. The effect of the clause is, and was intended to be, to relieve the mortgagees from the burden of ascertaining to whom the surplus belongs and the responsibility for its proper distribution. The contention that said clause operates to vest the surplus moneys in the husband as his sole property cannot prevail, because a wife may not convey or release inchoate right of dower to her husband directly, though she may by joining with him in a conveyance release it to his grantee. If in a case where the husband had no judgment creditors, and the surplus moneys became his sole property through the clause in question in the mortgage, it would be in effect releasing the wife's inchoate right of dower directly to her husband, by the combined efficacy of an instrument in writing and a foreclosure suit. Furthermore, where there are creditors, it would be enabling those whose judgments were docketed after the marriage to entirely override the wife's right of dower, thus reversing another well settled rule. There can be no doubt as to the wife's right to be endowed of this surplus. To hold that her claim may not be asserted in this proceeding would be to concede that she has a legal right, yet to deny her any effective remedy to enforce it. In one sense, dower is a vested interest in the land. It is subject to being divested by death or divorce, but

the interest is ascertained, and the exact person to take the interest upon the happening of a certain event (the husband's death) is also ascertained, and it is therefore not an abuse of legal terminology to speak of it as a vested interest. Still, aside from this consideration, a wife's right of dower is not an interest with which the courts are disposed to be technical.

Order affirmed.

Opinion by *Larremore, Ch. J.*, *Daly* and *Van Hoesen, JJ.*, concur.

INFANTS. JURISDICTION.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People ex rel. Caroline Williams, *respt.*, v. Anthony Corey, *applt.*

Decided Nov., 1887.

A county judge has no power to act in a matter relating to the care, custody or control of infants. His powers to perform the duties of a justice of the Supreme Court at chambers are purely statutory; and the general equity jurisdiction which is possessed by justices of the Supreme Court does not attach in any way to a county judge or to his acts.

Appeal from order of a county judge taking an infant from its father and awarding its custody to the relator.

L. S. Astobal, for *applt*

McKnight & Boyce, for *respt.*

Held, That the order was in excess of the jurisdiction of the county judge and was void. A county judge possesses the power conferred by law, in general language, upon an officer authorized to perform the duties of a justice of the Supreme Court at chambers or out of court." Code Civ. Pro.,

§ 241. Hence application may be made to him for a *habeas corpus*. Code Civ. Pro., § 2017, subd. 3. But the writ thus authorized is "for the purpose of inquiring into the cause of the imprisonment or restraint, and in a case prescribed by law of delivering him therefrom." Code Civ. Pro., § 2015. The power thus conferred does not, however, include jurisdiction of the care, custody and control of infants. The chancellor formerly exercised this power, 14 N. Y., 575, and it was transferred to the Supreme Court. Const., Art. 6, § 6; Code Civ. Pro., § 217. The chancellor exercised this power at chambers, 14 N. Y., 575, and by the Judiciary Act of 1847, Chap. 280, § 16, a like power was conferred upon the Justices of the Supreme Court. This section of the Judiciary Act was repealed. Laws of 1877, Chap. 417, subd. 21. Justices of the Supreme Court at chambers out of court cannot now by virtue of the statute exercise the jurisdiction. Therefore county judges cannot. 6 Civ. Pro., 299; 59 How., 174; 1 Duer, 209; 24 Barb., 521.

There is a Supreme Court in chambers which can exercise this power. But that results from equity powers inherent in the court which have nothing to do with the statute. The county judge cannot hold Supreme Court in chambers, has not this equity power and gets his jurisdiction only from the statute.

Order reversed.

Opinion by *Landon, J.*; *Fish* and *Parker, JJ.*, concur.

JUDGMENT. PRACTICE.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

The Citizens' National Bank of
Towanda, *applt.*, v. Moses Shaw,
survivor.

Decided Dec., 1887.

Where the affidavit attached to an offer of judgment which defendant's attorney is authorized to make is made by the managing clerk of defendant's attorneys, and such offer is accepted by the attorneys of plaintiff, which acceptance is properly verified, and a judgment is entered upon such offer and acceptance, the failure of defendant's attorney to make and attach the required affidavit to the offer of judgment is an irregularity, which plaintiff may waive, and such acceptance and entry of judgment is a waiver, and the validity of the judgment cannot be attacked by a third party. The record of the judgment may be amended on motion *nunc pro tunc*.

The question whether or not a judgment is fraudulent against creditors of defendant cannot be properly raised and determined on motion; the remedy for relief upon that ground, if it exist, must be by action.

Appeal from order of Special Term depriving the lien of execution of its priority by virtue of its levy, to that attachment subsequently levied on the same property in behalf of another creditor of defendant.

The judgment in this and other actions against the same defendant were entered July 29, 1887, upon offers which defendant's attorneys had authority to make, made and accepted for amounts aggregating upwards of \$60,000 and executions were issued upon them severally and levied upon certain property of defendant.

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The affidavits of authority to make offers and annexed to them respectively were made by the managing clerk of the attorneys for defendant who were the same in all the actions. In August following, the Farmers' & Mechanics' Nat. Bank commenced an action against defendants to recover an alleged debt, in which an attachment was issued and levied on the same property. The attachment creditors afterward moved to set aside the judgments, and at the same time motions of the judgment creditors were heard for leave to file *nunc pro tunc* the affidavits of one of the attorneys of their authority to make the offers of judgment. The orders of the court made the lien of the executions junior to that of the attachment and permitted plaintiffs to file such affidavits as of the time of the entry of the judgments subject to the preference, given by the orders of the levy of the attachment, and from so much of the order in this and three others actions as so postponed the lien of the executions, plaintiffs severally appeal.

Sheldon T. Viele, for *applt.*

Adelbert Moot, for Farmers' & Mechanics' Bank, *respt.*

Held, That this was a proceeding in an action, as the parties had been brought into and were within the jurisdiction of the court, and we think the provisions of the statute, Code Civ. Pro. §§ 739, 740, directing the annexation of the omitted affidavit was designed solely for the benefit of the parties, and as a safeguard against

the exercise by their attorneys of the power as such, to determine their rights involved in actions without the authority of their clients, and that while as between them the failure to observe the requirement is available, it is an irregularity in the action relating to the proceeding for judgment which the parties may waive, and does not legitimately concern third parties, and therefore having been waived is not the subject of their criticism going to the validity of the judgment, and the record is properly amendable in that respect on application of the parties to the action. 73 N. Y., 256; 89 id., 146; 26 id., 418.

There are some allegations in the affidavit on the part of the moving party to the effect that the judgment was void and fraudulent as against creditors of the debtor, and plaintiff in opposition to the motion presented affidavits tending to show that the debt for which the recovery was had was just and fair.

Held, That the question whether the judgment was fraudulent against the creditors of defendant cannot be properly raised or determined upon motion. The remedy for relief upon that ground, if any cause exists for it, should be taken by action. 76 N. Y., 313.

Order reversed. And to enable the respondent to take such other or further proceedings as it may be advised by action or otherwise the further execution of plaintiff's judgment stayed for ten days.

Opinion by *Bradley, J.; Smith, P. J.*, and *Barker, J.*, concur.

ELECTIONS.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

The People ex rel. Henry Russell., v. The Board of Canvassers of Albany County.

Decided Dec., 1887.

Inspectors of election made and signed in duplicate on the night of election a statement of the votes for senator and delivered one to the town clerk and one to the county clerk. Six days later two inspectors made a second statement changing the result. They delivered this to the supervisor who delivered it to defendants. It appeared that the latter proposed to consider it. *Held*, that the second statement was void; that defendants had committed an error in using the second statement for any purpose and that within Chap. 460, Laws of 1880, a proper case arose for the court to forbid the use of the second statement and to order defendants to consider in its stead the original filed with the County Clerk.

Application under Chap. 460, Laws of 1880, for a mandamus to compel defendants not to canvass an alleged irregular election return. At the close of the election in Nov., 1887, the inspectors of election for the eleventh district of the town of Watervliet made and signed in duplicate a statement of the result as to senator. They delivered one statement to the town clerk and one to the county clerk to be filed. By law they should have delivered one of these statements to the supervisor of the town instead of to the town clerk and should have filed a copy in the town clerk's office. Six days after the election two, only, of the inspectors made and signed an alleged copy of the original

statement, but this differed from the original in giving Henry Russell, republican, forty-five votes less, and Norton Chase, democrat, forty-five more for the office of senator. This elected Chase, if counted. Two inspectors delivered this second statement to the supervisor who presented it to defendants; and from the affidavits of the relator there was reason to think that defendants proposed to consider it. They had laid it before a committee of their body charged with making a preliminary statement of the votes cast and the committee had entered the results of this statement or return in a tabulated statement prepared by the committee for the final adoption of the board. The Special Term granted a mandamus.

D. Cady Herrick, for Chase.

Hamilton Harris, for relator.

Held, That it was not within the powers of the inspectors to make the second statement and that it was wholly invalid as a legal change of the original statement. The law contemplates that the duties of the inspectors in their respects be promptly performed that the result may be declared as soon as possible without any bias arising from a knowledge of its effects upon the aggregate result or from exposure to subsequent influences. Like the verdict of a jury when once regularly delivered, the jurors themselves cannot overthrow or defeat it. Defendants have only ministerial duties to perform and could not pass upon the genuineness of

the second return. It was therefore proper to invoke the aid of the courts. Within the statute this was an error committed which the court might compel the board to correct. It was an error to use this second return for any purpose.

Order affirmed, but amended so as also to declare that the board substitute the return filed with the county clerk for the irregular return.

Opinion by *Landon, J.*; *Fish* and *Parker, JJ.*, concur.

CREDITOR'S BILL. CONSIDERATION. STATUTE OF FRAUDS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

White's Bank of Buffalo et al.
v. Matilda Farthing et al.

Decided Oct., 1887.

The question whether a conveyance is made in good faith or not is one of fact and not necessarily controlled by the fact whether the purchase price paid is more or less than its value.

Part performance of an oral agreement to sell and purchase land furnishes the right to equitable relief, notwithstanding the statute of frauds, and where a party agrees to give a lot to another on condition that the party to whom it is given makes improvements on said lot, which improvements are made, this performance constitutes a valuable consideration for the oral promise such as to support a claim for specific performance, and takes the agreement out of the statute, and a devisee takes title to such lands subject to such agreement.

Facts testified to by parties to an action not found by the court are for the reason of the relation of the witnesses to the action and their interest, because the

question is one of credibility, not to be treated as established, as against facts found by the court.

While the notes on which the action was brought were made subsequent to the conveyances sought to be set aside, yet if they were the last of a series of renewals, although the creditors were indorsers and the notes were paid from time to time through the process of renewals, yet as between the creditors and the indorser the debts evidenced by the notes may be properly treated as that or a portion of it for which the first of the series of notes were made.

Appeal by all parties except defendant John Kelly from the several portions of the judgment entered against them upon the decision of Special Term.

Action in the nature of a creditor's bill to set aside as fraudulent against creditors of Matilda Farthing conveyances and transfers of property made by her to the other defendants Farthing, and charging that the apparent title in the defendant Kelly to other property is held by him in trust for her and seeking its appropriation to the payment of her debts. For many years George and Thomas Farthing were engaged in the distillery and cattle business at Buffalo. George died Nov. 30, 1881, leaving a will which went to probate and record, by which he devised and bequeathed all his property to his wife, the defendant Matilda, and expressed the desire that she take his place in the firm and business, which she did, but personally gave it no attention. The firm failed May 1, 1883, and judgments were afterward recovered by plaintiffs respectively against its members, Matilda and

Thomas Farthing, upon which executions against their property were returned unsatisfied. A considerable portion of the property in question came to the defendant Matilda by the will of her husband. While the evidence tends to prove that the firm was in reasonably good credit, and was deemed financially sound up to about the failure, the trial court found that it was in fact insolvent for several years before and at the time of the death of George Farthing and so continued until it failed, and that the property of defendant Matilda, from and after the time of such death was insufficient to pay her debts. The firm's business was large and continued without apparent embarrassment until near the time of the failure, but there is some evidence to the effect that from January, 1882, the liabilities of the firm exceeded the amount of its property. In Dec., 1882, the defendant Matilda conveyed to her son, William Farthing, a lot on Michigan street, subject to a mortgage of \$5,000, for which he paid \$500. The court found that this conveyance was made in good faith and the consideration adequate to this finding. Plaintiff's counsel excepts.

In the same month she also conveyed to him an undivided half of a lot on Lloyd street and a parcel of land adjoining for \$3,000. The court found facts in support of this conveyance.

She also transferred to him certain leases, for oil purposes, of lands in Pennsylvania upon which there were several producing wells.

This was property which she received through the will of her husband, and she made the transfer in satisfaction of a debt of \$10,000 which William J. claimed his father owed him at the time of his death, and he testified that his father did owe him that amount arising out of transactions to which he referred. The court found the fact in support of this transfer and its validity.

She also assigned to him a bond and mortgage made to her to secure a portion of the purchase price of certain premises sold by her in Buffalo. The court held this valid.

These several conclusions of the trial court are challenged by plaintiffs, as well as the finding of the court sustaining the title of Kelly to property above mentioned in him-

Truman C. White, for plffs.

B. S. Farrington, for defts. Farthing.

John W. Fisher, for deflt. Kelly.

Held, That while there is evidence tending to prove that the house and lot conveyed on Michigan street was worth \$10,000 and upward, the question whether the conveyance was made in good faith was one of fact for the court, not necessarily controlled by the fact whether the purchase price paid was equal or less than its value. The conclusion that the consideration was adequate to support the conveyance, we think, was permitted upon the evidence, although it was considerably less than the value of the property. 52 N. Y., 274.

That the court having found the existence of the indebtedness of George Farthing, deceased, to William J., the conclusion reached properly followed. 61 N. Y., 626; 76 id., 213; 89 id., 446. The questions arising out of the conflict and inconsistencies of the evidence, which may be attributable to various causes, were peculiarly for the consideration and determination of the trial court, where the opportunity for estimating the character and value of the evidence of the witnesses was superior to that of the court on review. We see no occasion to overrule any of the facts so found supporting the title to the property derived by William J. from his mother; and the same remarks apply to the findings in support of the title of Kelly.

The trial court determined that the conveyance of the lot of forty feet on the south side of Swan street by Matilda to William J. was fraudulent as against creditors, and found as facts in support of that conclusion that the "conveyance was made by the defendant Matilda Farthing to carry out an understanding existing between the defendant William J. Farthing and his father, George Farthing, deceased, in his lifetime, in and by which said George promised to give William J. the land in case he would build upon it and improve it, and said William J. entered into possession of it and made improvements in the way of erecting buildings upon it * * * . The consideration recited in this deed is \$500; but there

was in fact no legal or other consideration than natural love and affection for this conveyance, and it was fraudulent and void as against the plaintiffs." William J. Farthing testified to the arrangement which was made twelve years before the trial, that he was then recently married and immediately went on and improved this lot by filling in water hole on it and built a house and barn upon it, which he occupied, and from that time the premises were called his by his father's family; and the defendant Martha testified that she understood the arrangement at the time.

Held, The question of the credibility of those parties so far as relates to the arrangement is supported by the finding. The solvency of George Farthing as of that time must upon the evidence be assumed. From an early day the part performance, in the sense in which that term is applied, of an oral agreement to sell and purchase land furnished the right to equitable relief by way of specific performance, notwithstanding the statute of frauds, and its application was to cases in which damages for non-performance could not accurately be measured, and then made to prevent fraud, which the use of the statute might otherwise produce. This rule is expressly recognized by 2 R. S., 135, § 10. The agreement and its performance found by the trial court seems to come within it. This performance by William J. constituted a valuable consideration for the oral promise of his father to give him

the premises, and was such as to support his claim for specific performance in his lifetime. 43 N. Y., 34; 36 id., 327; 64 id., 286. The agreement, in view of the part performance, was not within the statute of frauds, and the title was held by George as trustee for his son William J. At the time it became effectual by such performance on the part of the latter there was no obstacle as against creditors in the way of thus disposing of the lot by the father to the son. 81 N. Y., 584; 89 id., 405. And no reason appears why the right so acquired by the latter was not such as to support the conveyance made by Mrs. Farthing in consummation of such agreement made by her deviser. It was the performance of his undertaking assumed by him eight years before his death, and subject to which the devisee took the title. 63 N. Y., 434.

The trial court found that a lot on Seneca street conveyed to William J. May 17, 1882, also a lot conveyed by Matilda to her daughter Mary, Dec. 30, 1882, were without consideration, except love and affection, and void as to creditors.

Held, That as the facts testified to by the parties in reference to these two conveyances are not found by the court, and for the reason that by the relation to the action and the interest of the witnesses who gave the testimony, the question is one of its credibility, they cannot be treated as established for the purpose of this review as against the facts so

found. The two last conveyances must therefore be treated as voluntary. Whatever view the parties may have had of the financial condition of the grantor the court was permitted to find them fraudulent as against then existing creditors of the grantor if she had not remaining adequate means to discharge her liabilities.

That while the notes on which the action was brought were made subsequent to the time of the conveyances in question, the evidence justified the conclusion that they were the last of a series of renewals of notes made in 1878 and 1879, and although the Farthings' firm was indorser and the notes from time to time were paid through the progress of renewals, we think as between the firm creditor and the indorser the debts evidenced by the notes may properly have been treated as that or a portion of it, for which the first of the series of notes were made.

Portions of judgment appealed from by plaintiffs affirmed with costs to defendant Kelly, and without costs to any other party.

Portion relating to the conveyances made by Matilda Farthing to William J. Farthing of the date May 18, 1882, lot on south side of Swan street, and so far as relates to that lot and the rents and profits thereof should be reversed and a new trial of the issues relating to that conveyance should be granted, costs of appeal to abide event, unless plaintiffs stipulate to so modify the judgment as to strike from it the provisions relating to such conveyances and premises and

have it adjudged that as to such conveyance the complaint be dismissed on the merits, and in that event judgment so modified affirmed, without costs to plaintiffs or to the defendants Farthing.

Opinion by *Bradley, J.; Smith, P.J., and Childs, J.*, concur.

DIVORCE. EVIDENCE.

N. Y. COURT OF APPEALS.

Cross, *respt.*, v. Cross, *impl'd.*, *applt.*

Decided Jan. 17, 1888.

A party who calls his adversary as a witness cannot impeach his character for truth, but is at liberty to dispute specific facts though sworn to by him.

A decree of a foreign court dissolving a marriage between a citizen of that State and a citizen of this State is void for want of jurisdiction where the process was not personally served or the defendant personally appears.

Affirming S. C., 22 W. Dig., 809.

This was an action for separation and alimony. It was commenced Feb. 23, 1882. The plaintiff alleged that defendant her husband, abandoned her without her consent Jan. 9, 1878, and still continued such abandonment, and since May 1, 1881 has wholly ceased and neglected to provide for her. Defendant denied that he had ever abandoned plaintiff or refused to provide for her support and maintenance. He alleged that plaintiff abandoned him voluntarily and without cause, and has since refused to live with him though requested to do so. Defendant swore that he did not abandon his wife but

sought in good faith and patiently a restoration of their marital relations. Plaintiff called defendant as a witness upon the trial. Defendant claimed that plaintiff having called him as a witness gave him credit as such and so became bound by his evidence.

B. F. Tracey, for applt.

George G. Reynolds, for resp't.

Held, Untenable; that by calling defendant as a witness plaintiff did not become forced to admit as true every fact to which he testified, that while not at liberty to impeach his character for truth she was at liberty to dispute specific facts, although sworn to by him, and the trial court had the right to confront his statement of his mental conclusion with the facts and circumstances of his conduct, his letters and declarations, and determine from the whole evidence whether he did form a settled determination to abandon his wife. Being both a hostile and deeply interested witness, all his testimony was a proper subject for consideration with freedom to believe or doubt and reject. 104 N. Y., 194.

Upon the trial a judgment of divorce obtained in Illinois was put in evidence by him as an answer to plaintiff's cause of action. It appeared that during the pendency of that action and when the judgment was rendered defendant therein was domiciled in this State, was not served with process, did not appear in the action, and had no actual notice of its existence until a copy of the final decree was served upon her.

Held, That no jurisdiction having been acquired over said defendant in the Illinois suit the decree therein was void. 76 N. Y., 78; 101 id., 23.

It was also claimed that the court erred in admitting evidence to show that defendant was not a resident of Illinois when he obtained his decree.

Held, That the jurisdiction of the Illinois court being open to assault in spite of the recitals in the judgment, it was competent to question the truth of the foreign residence. 41 N. Y., 272.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Finch, J.* All concur.

SECURITY FOR COSTS. PRACTICE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Harriet L. Swift, *extr.*, *applt.*,
v. George N. Wheeler, *impld.*,
resp't.

Decided Dec., 1887.

An application for security for costs under § 3271, Code of Civil Procedure cannot be made regularly *ex parte*.

Appeal from order of County Court.

After issue joined, defendant Wheeler moved the County Court, under § 3271 of the Code, *ex-parte*, for an order requiring plaintiff to give security for costs, and thereupon an order was granted requiring plaintiff to give security with-

in ten days after service of a copy thereof, and staying plaintiff's proceedings until compliance with the order. Plaintiff thereafter moved the court, upon an order to show cause, to vacate such order. The order to show cause recited that it appeared to the court that the first order was made without notice and that there was no sufficient ground for requiring plaintiff to give security as therein required. The motion to vacate was denied, and from the order denying such motion this appeal is taken.

Waldo G. Morse, for applt.

Ivan Powers, for respt.

Held, That the order requiring security for costs to be given, having been made without notice to plaintiff, was irregular. Formerly, a motion for an order requiring plaintiff to file security for costs, as provided by 2 R. S., 620, § 1, could be made only on notice, or, which was the same thing, on service of an order to show cause. 3 Wend., 445; 6 Hill, 256. The Code has not changed the practice in that respect as to motions under § 3271. And a motion of that nature is no exception to the general rule of the court requiring motions to be brought before the court on notice or order to show cause.

It cannot be successfully contended that the motion to vacate was properly denied because the irregularity was not specified. The recital in the order to show cause was a sufficient compliance with the rule in that regard.

Order denying motion to vacate

reversed with costs and disbursements to appellant.

Opinion by *Smith P.J.*; *Barker*, *Haight* and *Bradley, JJ.*, concur.

CERTIORARI. JURISDICTION. HIGHWAYS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The People ex rel. Jasper Stockwell, Commissioner of Highways, v. Louis Newgrass et al., referees, etc.

Decided Dec., 1887.

None of the proceedings taken upon an application to lay out or alter a highway to the commissioner of highways preceding an appeal are brought before the court on a writ of *certiorari* directed to the referees only, to review an order made by referees reversing the decision of the commissioner of highways.

The statutory notice given to the commissioner of the hearing before the referees gives jurisdiction to the referees to proceed with the hearing, and the notice to the occupants contemplated by the statute may follow the reversal of the order of the commissioner, but the referees cannot make the determination to lay out or alter a highway without notice to the occupant, and if they do so in that respect their action will be without jurisdiction, and if such omission appears by the record the determination of the referees cannot stand, but if not, this objection is not available to the relator.

Certiorari to review proceedings of referees on appeal from order of the commissioner of highways refusing to alter a highway in the town of Ira, county of Cayuga.

Defendants were by the county judge of that county appointed as referees to hear and determine such appeal, and by the decision

of a majority of them the order of the commissioner was reversed. The writ was directed to the referees only, and the case is heard upon their return. It appeared by the return to the writ that the referees met at a time and place appointed; that the appellant and commissioner appeared and gave proofs, and after they were closed and the matter submitted all the referees deliberated together, and two of them united in a decision reversing the order of the commissioner, in which the other did not join. The testimony of the witnesses taken on the hearing is not set out in the return. The relator seeks to raise questions going to the jurisdiction and regularity of the proceedings taken upon the application to the commissioner and anterior to the denial of the application to alter the highway, and with that view asserts that no notice was given by the applicant to the owners or occupants of some of the improved lands to be affected by the proposed alteration; that no consent in writing appears to have been given by them, and that no jury has been drawn or summoned to certify the necessity of such alteration.

A. P. Rich, for relator.

Woodin & Warren, for defts.

Held, That none of the proceedings taken upon the application to the commissioner and preceding the appeal are brought here by the writ. The proceeding is, in some sense and in practical effect, a new one instituted by the appeal to lay out or alter a highway and dependent upon the facts as they

exist at the time of the hearing. 5 N. Y., 468; 78 id., 21. The parties to it are the appellant and the commissioner from whose order the appeal is taken. The hearing and determination of the appeal are upon, and confined to, the merits. The proceedings prior to the appeal are not the subject of inquiry or consideration by the referees, and are not involved in a review of their determination by *certiorari*.

It is also contended that because it does not appear by the return that any notice of the hearing before the referees was given to the occupants or owner of the lands through which the proposed altered line of the highway was located the determination must be deemed to have been made without jurisdiction.

Held, That under the statute, 1 R. S., 514, § 62; 518, §§ 87 and 88; 519, § 91, when on such an appeal, the order refusing to lay it out or alter such highway is reversed, which provides that the referees shall lay out or alter it, and in so doing shall proceed in the same manner in which the commissioner is directed to proceed, and before they shall determine to do so they must give three days' notice to the occupant, etc. The notice to the commissioner to attend the hearing gives jurisdiction to the referees to proceed with the hearing, and the notice to occupants contemplated by the statute may follow the reversal of the order, yet they cannot make the determination to lay out such road or make such alteration without the notice to the occupant

and if they do so in that respect will be without jurisdiction, 20 Wend., 186; 54 N. Y., 52; 65 id., 452, and if, therefore, such omission appeared by the record the determination of the referees to make the alteration of the highway could not stand; but it does not so appear. This review is had solely on the return to the writ, and under the circumstances of this case, as the evidence was "expunged" from the return "by stipulation," and therefore the return rendered imperfect and incomplete, this objection is not available to the relator upon the record.

Determination of the referees affirmed.

Opinion by *Bradley, J.; Smith, P.J., Barker and Haight, JJ.*, concur.

TAX SALES.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

People ex rel. Geo. W. Ostrander et al. v. Alfred C. Chapin, comptroller.

Decided Nov., 1887.

Lands were sold in 1859 for taxes and a deed given to R., who subsequently conveyed to several grantees, in quantities which do not appear. R. died. Thereafter the sale was cancelled. R.'s administrator assigned his claim to the moneys to be refunded to relators, who applied to the comptroller for said moneys under § 85, Chap. 427, Laws of 1855. *Held*, That R.'s representatives were not entitled to these moneys, but that his grantees were so entitled.

Certiorari to review proceedings of defendant denying the applica-

tion of relators to have refunded to them certain moneys because a tax sale was cancelled. The lands in question were sold in 1859 and Orson Richards was the purchaser and received a deed. Richards conveyed parts of the premises to various persons and no proof was made here as to how much he had conveyed. Richards died intestate and an administrator was appointed. In 1885 the sale was cancelled. After the cancellation and in Dec., 1885, the administrator assigned the moneys in suit to one Marsh and Marsh assigned them to relators.

Stedman, Thompson & Andrews, for relators.

D. O'Brien, Atty. Genl., for resp.

Held, That the application was properly denied. Section 85, Chap. 427, Laws of 1855, provides that whenever the comptroller shall have sold lands for taxes and "if the discovery that the sale was invalid shall not be made until after the conveyance shall have been executed for the lands sold, it shall be the duty of the comptroller on receiving evidence thereof to cancel the sale and to refund out of the State treasury to the purchaser, his representatives or assigns the purchase money and interest thereon." When the sale was cancelled neither Richards nor his representatives held the lands. His grantees, *i. e.*, assigns, did, and to them these moneys are payable. If, for example, Richards were insolvent he under any other construction would get double pay and his grantee would get nothing.

The right of the grantee is sustained by 40 Hun, 386. This case was reversed in 104 N. Y., 96, but on other grounds.

Order of comptroller affirmed.

Opinion by *Landon, J.*; *Parker* and *Fish, JJ.*, concur.

PARTNERSHIP. ATTACHMENT.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

William B. Sterrett et al., *respts.*, v. The Third National Bank of Buffalo, *applt.*

Decided Oct., 1887.

The several members of a copartnership have no individual interest in the partnership assets except in the surplus that shall remain after an adjustment and settlement of the partnership affairs; and whether or not there is any interest in partnership property which is liable to levy of an attachment, or execution, issued in an action against one of the members of a firm, for the collection of an individual debt, depends upon the fact whether the firm is solvent or not at the time the levy is made. And upon an accounting there would be a surplus, after the payment of all the firm liabilities.

Solvency imports adequate means of a party to pay his debts, which embraces within its meaning, the opportunity by reasonable diligence to convert and apply them to such purpose, and where the assets of a firm consists of property of a character that has a constantly fluctuating market price, the financial condition of the firm owning it is not necessarily established by the fact that the price for an hour or a day named would produce an excess of its liabilities so as to furnish an interest in the individual partners and subject the firm property to the process of their respective creditors.

In an action for conversion of partnership property on attachment against one of its members the question simply is whether

there were sufficient assets to pay the firm debts and produce a surplus, and that depends upon the then existing rights of the firm; if there are interests not available for the purpose of an accounting between the members of the firm themselves, arising out of fraudulent transfers of property fraudulent as to creditors, such interests are not available as a defense of an action of this nature but the relief must be sought in a proper action where all of the parties may be brought into court.

Appeal by defendant from an order of Circuit Court denying motion for a new trial on the minutes.

The cause of action was for the conversion of four certificates of the United Pipe Line Co., each representing 1,000 barrels of oil. The answer puts in issue the material allegations of the complaint, and alleges by way of justification the levy of an attachment upon the interest of the plaintiff Sterrett, the recovery of a judgment against him, and sale by virtue of an execution issued thereon.

It appears that plaintiffs were partners engaged in the business of producers and dealers in petroleum oils at Titusville, Pa.; that in Sept., 1882 they gave their notes to defendant for \$7,500 and \$2,000 and as collateral security for their payment deposited with it pipeline certificates; that on Dec. 8, 1882, defendant held as such collateral twelve of those certificates representing 1,000 barrels of oil each, and on that day defendant caused the levy of an attachment thereon against the property of plaintiff Sterrett, issued in an action in its behalf against him on his note; that on Dec. 11, plaintiffs paid

their notes held by defendant, and demanded of it the possession of the twelve certificates, which defendant refused to deliver. That on Dec. 15 eight of the certificates were delivered to plaintiff pursuant to an arrangement then made whereby it was agreed that the interest of Sterrett in the twelve should be treated as embraced in the four certificates not delivered, without prejudice to any rights of plaintiffs in respect to the latter. Defendant afterward recovered judgment in its action against Sterrett and caused the four certificates to be sold by the sheriff by virtue of an execution upon such judgment. Plaintiffs recovered.

Adelbert Moot, for applt.

C. D. Murray, for respts.

Held, That the right to levy the attachment upon the certificates depended upon the question of fact submitted to the jury, whether plaintiffs' firm was solvent or insolvent, because the copartnership as such had rights and interests distinct from those of the several members; they severally had no individual interest except in the surplus that should remain after adjustment and settlement of the partnership affairs. If the firm was insolvent, the member Sterrett had no interest in the firm property; 73 N. Y., 264; 86 id., 286. This right of property for the purpose of paying the partnership debts, as against the appropriation of it to the payment of the debts of the individual members whether voluntary on their part or by means of legal process in behalf of creditors, may be as-

serted by the firm; and through the equities of the members in support of such right that the partnership creditors may by their action take the preference in respect to the partnership property. 6 N. Y. S. R., 452.

Plaintiff's evidence tended to show that the partnership debts on the 8th and 11th of Dec., 1882 amounted to \$100,085.35 and its assets consisted of 89,000 barrels of oil and \$221.24 in accounts, and nearly or quite all the certificates for the oil were hypothecated as security for the payment of its debts; that on Dec. 8 the highest price for oil was 1, 17, 1-4 and the lowest 1, 12; on Dec. 11 this price 1, 12 and 1, 08 1-4 and on Dec. 15 at the time the eight certificates were delivered to plaintiffs, it was 96 1-2 and 93 and the average price daily during the residue of that month still lower. Taking the lowest price on the 8th and the highest on the 11th of Dec. the value of the oil was about equal to the firm liabilities, but after that and during this month the price would make it less. These certificates were treated in the trade as negotiable paper.

Held, That plaintiff's property, consisting as it did of oil, or certificates giving a right to it, might one day have a value exceeding and the next day below the amount of their liabilities, and as these certificates were mostly not in the possession of plaintiffs, and though the market was available each day for sale of oil at the then market price, and assuming that on Dec. 8 the day that the attach-

ment was levied, the market price was such that plaintiffs' oil, if sold, would have produced a sum exceeding the amount of their liabilities, the question arises whether under the circumstances the firm will be treated as solvent as of that day, so as to furnish an interest in Sterrett subject to and in support of the levy of the attachment. The margin in excess of the value that day was comparatively small, and the pipe-line certificates being held by various banks and bankers as collaterals were not available to it for the purposes of sale at that time. Solvency imports adequate means of a party to pay his debts, which embraces within its meaning the opportunity by reasonable diligence to convert and apply them to such purpose. In other words, a person is deemed insolvent who at the time in question is unable to pay his debts. And in view of the situation of plaintiffs' property, and the fluctuating nature of its value, and the right of the firm to protect its creditors, and the necessary time it would take to wind up its affairs, we think that upon the evidence the conclusion was permitted that Sterrett had no interest in the firm property at the time the attachment was levied upon the certificates in question.

Plaintiffs' partnership was formed about Oct., 1880. No capital was put in by the members, they bought a tract of fifty-two acres of land for \$23,701, borrowed the money to pay for it, put down wells, and July 5, 1882, sold and conveyed it to the Second National

Bank of Titusville for \$16,000 in payment of the amount of debts owed that bank and another. Plaintiff Hyde was the cashier of the Second National Bank and Sterrett one of the directors. The evidence tended to show that the price paid by the bank was the fair value at the time. The bank operated the property until about Jan., 1884, when it sold it and realized a profit of \$9,000 which it gave Hyde who put it to the credit of the firm.

Defendant's counsel requested the court to charge "that if the jury are convinced that this conveyance to the Second National Bank of Titusville was made for the purpose of hindering, delaying and defrauding the creditors of Mr. Sterrett in collecting their debts, they were at liberty to consider that property at what they deem its fair valuation as assets of the firm on the 8th day of Dec., 1882, for the purpose of ascertaining whether it was solvent or insolvent" and to the refusal of the court to so charge excepted.

Held, That when property subject to original levy and sale by execution has been transferred by the debtor in fraud of his creditors the officer subsequently levying the attachment upon the property, the attaching creditor or purchaser at the sale finally made on the execution may in defense of the attachment lien or title derived from its execution, defeat such transfer by showing that it was fraudulent as against creditors of such debtor. The sale and conveyance referred to were absolute

in terms and as between the bank and plaintiffs the latter had no interest in the property or its proceeds. Defendants had no charge upon the land by force of their proceeding to reach the interest of Sterrett in the firm assets. The question simply was whether they were sufficient in due course of appropriation to pay the firm debts and produce a surplus, and for the purposes of the defense in this action that depended upon the then existing rights of the firm. If there are interests not available for the purpose of an accounting between the members themselves arising out of transfers of property alleged to have been fraudulent as to creditors, the creditors of the respective partners, as well as those of the copartnership, may in a proper action bring all the necessary parties to the controversy into court with a view to a requisite remedy and relief. The question is not within the defense to this action and the exception not well taken.

Order affirmed.

Opinion by *Bradley, J.; Smith, P.J., Barker and Haight, JJ.*, concur.

MURDER. EVIDENCE. NEW TRIAL.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The People, *respt.*, v. Charles Johnson, *applt.*

Decided Dec., 1887.

When a person confined in a common jail upon a lawful commitment for a felony attempts to escape by force from such

jail, although he fail in such attempt, and while prosecuting such attempt kills a human being, although the act is committed without the design to effect death, he is guilty of murder in the first degree.

In such a case where the warrant of commitment substantially conforms in its terms to the statutory requirement it is *prima facie* evidence that the prisoner is lawfully imprisoned or in custody, and it is not necessary to go behind the warrant of commitment.

A common jail is a prison within the meaning of the Penal Code, § 92.

The omission to administer the oath to officers provided by § 412, Code Crim. Pro., placed in charge of a jury when a view of the premises where the crime was committed is ordered by the court, is a mere irregularity, and will not require or justify a new trial unless there was some opportunity to conclude that the defendant was prejudiced thereby.

That such a view of the premises in some sense is evidence, and when it does not appear whether the defendant was present or not, but that the counsel assisting in the trial for the defense was present, and the prisoner was not denied the right to be present, no ground for a new trial is afforded.

Appeal from judgment upon verdict of Seneca Oyer and Terminer convicting defendant of the crime of murder in the first degree.

He was charged jointly with Edward Caldwell and Marcus Fisk by indictment containing twelve counts with the crime of which he was convicted and, took his trial separately. The victim of the alleged crime was John Walters, whose death was caused by blows received by him on the head in the jail of Seneca County at Waterloo, Jan. 9, 1887, while he was by direction of the sheriff proceeding to lock the cells occupied by the persons in custody there, of whom

the three persons indicted were a portion. They made the attack upon the deceased for the purpose of making their escape from the jail, and were unsuccessful. Defendant was confined in the jail by virtue of two commitments, one charging grand larceny in the first degree, and the other charging burglary in the third degree, issued by a committing magistrate of Seneca County, after an examination had before him.

Corydon Rood, for applt.

Fred L. Manning, for respts.

Held, That as it appears that defendant was confined in the jail on the charge of felony, and the killing was done in his attempt to escape and evidently in aid of such purpose, and as the statutes provides that a prisoner who, being confined in a prison or being in the lawful custody of an officer or other person, by force or fraud escapes from such prison or custody is guilty of a felony, if such custody or confinement is upon a charge, arrest, commitment or conviction for a felony, Penal Code, § 85, and as an act done with intent to commit a crime and tending but failing to effect its commission is an attempt to commit that crime, id., § 34, and as a person who unsuccessfully attempts to commit a crime is indictable and punishable by imprisonment for not more than one-half the longer term prescribed upon conviction for the commission of the offense attempted, id., § 636, it follows that upon conviction of an attempt in such manner to escape from lawful imprisonment on

the charge of the crime mentioned in the commitment defendant would be punishable in state prison, and that the offense would be a felony, id., § 5; 99 N. Y., 210. And as the definition of murder in the first degree is the killing of a human being, unless it is excusable or justifiable, when committed without design to effect death, by a person engaged in attempt to commit a felony either upon or affecting the person killed or otherwise, this brings the offense within that charged in the indictment.

That where the warrant of commitment recites that it was issued upon information on oath, Code Crim. Pro., § 145, and had the form prescribed by statute, id., § 151, and it appears that an examination was had after the arrest, and although the magistrate was required by the statute to certify the testimony and return it and the depositions taken upon the information to the court, id., § 205, there was no necessity of producing these upon the trial in support of the warrant of commitment. The recital in the latter of the crimes with which defendant was charged as grand larceny in the first degree and burglary in the third degree was a sufficient statement of the nature of the crimes for the purposes in view. Each of them recited that an order had been made by the magistrate and in all respects substantially conformed in terms to the statutory requirement, id., § 214. It was not necessary to go back of them.

The court charged the jury that "a person confined in a common jail under a lawful commitment on a charge of a felony before indictment, who escapes from jail commits a felony, and if in attempting to escape, whether he succeeds or not, he kills a person, that act is by the statute murder in the first degree" and exception was taken.

Held, That a common jail is a prison within the meaning of the law, Penal Code, § 92, and as the court was not requested to charge further in that respect, in view of the facts established by the evidence, and to which the charge related, there was no error presented by the exception taken.

At the close of the evidence on the part of the prosecution and before any evidence was introduced on the part of the defense it was suggested by the people's counsel that the jury be permitted to view the place where it was charged that the crime had been committed. The court thereupon ordered the jury to be conducted there under the charge of two constables and shown the place and appointed Mr. Hazelton for that purpose. The jury were taken there in a body, and returned into court and the trial proceeded. One of the attorneys and counsel of defendant accompanied them. After the rendition of the verdict the counsel for defendant moved to set it aside "upon the ground that no officer was specially sworn to accompany the jury to view the premises." The motion was heard on affidavits for its support and in opposition.

Held, That the omission to administer the oath was an irregularity merely and did not require or justify a new trial unless there was some opportunity to conclude that defendant was prejudiced. In Y. C., 158, the statute provides for a view when in the opinion of the court it is proper, id., § 411, and when the suggestion was made defendant's counsel expressly consented to it and one of his attorneys and counsel attended the jury and returned with them into court, the trial proceeded and the evidence on the part of the defense was given without raising any question in respect to the correctness in any respect of the view made by the jury or relating to their action.

On the occasion the attorney of defendant who attended the jury and one of the guards in the jail by their affidavits stated that the latter was asked by one of the jurors, while taking the view, several questions regarding the location of the cells in which the prisoners Johnson, Caldwell and Fish were confined on the night of the murder, also as to the location or spot where the body of John Walters lay and that such "questions or some of them were answered" by him. The affidavits of two jurors were that the jurors asked some questions of one of the officers of the jail, that Mr. Hazelton promptly informed the officer that he must answer no questions and said to the jury that they had no right to ask any, and that this was all that occurred in that respect.

Held, That whatever view may

have been taken of the statements in the affidavits it cannot be assumed that the jury in respect to the situation and locality within the jail so far as they related to the subject of the trial were incorrect or different from those as represented by the diagrams and other evidence on the trial else the defense would have taken the opportunity, which it had, to give evidence on the subject.

That the taking of the view was in some respect evidence, and whether defendant was present or not present with the jury does not appear nor does it appear that he was denied any right in that respect. It appears that he was represented by his attorney and counsel who was engaged in the defense on trial. The reasons, therefore, which founded the ground for a new trial in *People v. Palmer*, 43 Hun, 397, have no necessary application here.

New trial denied and judgment affirmed.

Opinion by *Bradley, J.; Smith, P.J., Barker, and Haight, JJ.*, concur.

BONA FIDE PURCHASER. WILL.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

In re application of the city of Rochester, etc., *William Hamilton, applt.*, v. *George A. Smith, exr.*, *respt.*

Decided Dec., 1887.

When there is no specific lien for the payment of debts created by the terms of a will the statutory lien upon decedent's

real estate continues only for three years from the time of granting letters, and a *bona fide* purchaser may after that time take title relieved from the charge for the payment of debts. An assignee for the benefit of creditors is not such purchaser.

Testator shortly before his decease made a will in which he provided: "1. After all my just debts are paid and discharged, I give and bequeath to my wife Emily C. one equal one-third of the personal property of which I may die seized, and the use or income from one-third of my real estate during her natural life. 2. The residue and remainder of all my real and personal property of every name and nature I give, devise and bequeath to my son George R.," etc., and then gives to George R., as executor or trustee, "Full power and authority to sell, convey, transfer, mortgage or lease any of the property * * * and to invest the proceeds in such manner as to him may seem most judicious." *Held*, That in view of the fact that at the time of making the will and of the decease of testator the amount of his personal property was greatly inadequate to pay his debts, it must be assumed that he appreciated the situation, and had in view the purpose to give and devise only what remained after payment of his debts, and intended to make by his will his debts a charge on his real estate.

Appeal from order of Special Term denying motion to confirm referee's report, and directing payment to George R. Smith as executor of moneys arising from an award hereinafter mentioned.

Hiram Smith up to the time of his death owned mill premises and property situated on Henry creek, and in 1878 he with other mill-owners commenced actions to restrain the city of Rochester from taking water from those lakes of which such creek was the outlet, and his right to relief was finally established. 92 N. Y., 463. He

died May 14, 1883, leaving his will, which was made April 10, and admitted to probate and record May 19, 1883, by which he nominated his son George R. Smith executor, to whom letters were issued on the last mentioned day. The will contained the following provisions: "First: After all my just and lawful debts are paid and discharged, I give and bequeath unto my wife, Emily C. Smith, one equal one-third of my personal property of which I may die seized, and the use or income from one-third of my real estate during the term of her natural life. Second. The residue and remainder of all my real and personal property of every name and nature I give, devise and bequeath unto my son, George R. Smith, in manner following: One equal one-half of the same to him, his heirs and assigns absolutely, the other equal one-half to him in trust for the benefit and maintenance of my daughter, Emma C. Smith." The will contains further provisions in respect to the trust, and then gives to George, as executor or trustee, "Full power and authority to sell, transfer and convey, mortgage or lease any of the property * * * and to invest the same or the proceeds of the same in such manner as to him may seem most judicious," and bequeaths to him "the right and privilege to continue the business now engaged in by me or in which I may be engaged at the time of my death, in my name or otherwise, and for such time after my death as he may desire." Testator was engaged in the opera-

tion of the mills upon the premises before referred to. In Nov., 1883, Emily C. and Emma C. Smith by deed conveyed to George all their interest in such premises, water privileges, etc., appurtenant and released him from all claims against him as such executor and trustee. He accepted such conveyances subject to all incumbrances on the premises and assumed and agreed to pay all incumbrances on certain other premises by him conveyed to them and undertook to pay all the indebtedness against the estate of the testator.

Early in 1884 proceedings pursuant to statute providing for it were instituted by the city of Rochester to acquire the right to take water from those lakes. Commissioners were appointed, and in June, 1885, filed their report, which awarded to George R. Smith and Emily C. Smith as the owners of the mill property \$21,000. The report was confirmed. In March, 1884, George assigned all his interest in this money to be awarded in the proceeding to William Hamilton to secure the payment of the amount then due and which should become due for future advances to the latter from George. Further advances were made and George became indebted to Hamilton to the amount of \$12,000 and upward, and in Dec., 1884, George Smith made to Hamilton a general assignment for the benefit of creditors. At the time of the death of testator his debts over and above the incumbrances on his real estate amounted to upward of \$30,000, of

which \$23,000 unsecured liability remains unpaid, and there is no personal property of the decedent applicable to the payment of any of them. The award is the only fund or property from which they can be paid except he left other real estate, but it is not chargeable with debts until after this personal property is exhausted. It seems the mill premises at the time of testator's death were and remain considerably incumbered. Hamilton appeals from the order directing the payment to the executor of the fund produced by the award. The contest is between Hamilton as such special and general assignee of George R. Smith and the creditors of the estate represented by the executor of the will of Hiram Smith, deceased.

Theodore Bacon, for applt.

J. A. Stull, for resp't.

Held, That when there is no specific lien for the payment of debts created by the terms of a will the statutory lien continues for three years from the time of granting letters, and unless within that time the proceeding provided for is taken the power of the surrogate to direct sale of real estate and application of the proceeds ceases and a *bona fide* purchaser may take title relieved from the charge for the payment of debts. Code Civ. Pro., § 2750. But after that time the creditor may bring an action against the heirs and devisee or legatees to charge them as such or the property which came to them from the decedent. *Id.*, §§ 1844, 1852, 1853; 32 Hun, 46. It would seem to follow in that view

before it can be held that Hamilton had the unqualified title to the fund in question it must be determined that he has the situation of a purchaser in good faith for value, which is not found by the referee, and we are not able to determine upon the papers before us that he is such.

That the testator intended by his will to make his debts a charge upon his real estate. The reasons for this conclusion are found in the terms of the will itself, aided by other circumstances which are deemed sufficient to have furnished occasion for the purpose on his part to do so. The amount of his debts evidently was large at the time he made his will, and at the time of his death, which was shortly after, his personal estate was greatly inadequate for the purpose. It must be assumed that he appreciated the situation, and had in view the purpose to give and devise only what remained after deducting the amount requisite to pay them, as in the outset he by the will provided that after payment of his debts his wife should take one-third the personal estate and the use of one-third of the real property, and that the residue and remainder of his estate real and personal should then go as there directed. He in this manner blended the disposition of his real and personal estate and seemingly made the entire devises and bequests subject to the payment of his debts and embracing only what remained after they were paid. This is something more than a mere direction to

pay them. We think the words in the will in question are entitled to no less significance by way of construction than they would have if they were in the residuary clause. But it is not intended to be understood that general words of a like character in the opening paragraph of a will may in all cases necessarily have the effect to make debts of the testator a charge by it upon real estate. The great excess of debts over personal estate of the testator is a circumstance entitled to some consideration in giving effect to the provision referred to. While the power of sale is not in terms significant in that direction, it is consistent with the purpose that the debts should so far as necessary be a charge upon the realty, and to enable the executor to pay them from the proceeds of sale. 58 N. Y., 335; 84 id., 95.

Order affirmed.

Opinion by *Bradley, J.*; *Barker* and *Haight, JJ.*, concur.

TENANTS IN COMMON. CONVERSION.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Lineas Le Barren, respt., v. Samuel Babcock et al., appls.

Decided Dec., 1887.

Where one tenant in common of real estate enters upon such real estate and cultivates the land and raises a crop thereon the crop so raised belongs to him, and he can maintain an action for conversion against a co-tenant who enters upon the land so cultivated and carries off the crop so raised.

But the grass which grows upon such lands

is governed by a different rule; like trees growing thereon it is in some respect the natural product of the lands and is a part of the realty, and the mere act of mowing such grass is not sufficient, without evidence of ouster of the co-tenants, to give the person who shall cut the same title as against his co-tenants to the grass so cut, and he cannot maintain an action against a co-tenant for entering upon the premises and drawing off the grass or hay so cut.

Appeal from judgment entered no verdict, and from order denying motion on a case and exceptions for a new trial.

This action is for the alleged taking and carrying off and converting to their own use by defendants of a quantity of hay and oats.

It appears that in 1882 one Le Barren died intestate, seized of a farm, and leaving his surviving eleven children, one of whom was plaintiff, and another the wife of defendant, House. In 1885 plaintiff cultivated a piece of land on the farm and sowed oats, and when they matured cut them, and while they were lying on the ground defendant House, with the assistance of others raked up and drew them away; and plaintiff mowed some of the grass growing in the meadows on the farm, and was proceeding to cure and gather the hay so cut, when defendant House went into the field and drew some of it away. This was all done without the consent of plaintiff, who charges that all the defendants participated in the act of taking and removing the property. Defendant House in what he did acted on authority derived from his wife.

Morris & Lambert, for applts.

W. S. Thrasher, for respt.

Held, That it does not appear that there had been any ouster by plaintiff of the heirs of the ancestor or that he assumed to occupy the premises in exclusion of them; it must be assumed that all of them were at liberty and free to go upon the farm and occupy the premises jointly with plaintiff and he was not liable to them for the use and occupation had by him of the farm, defendant House, and plaintiff may be treated as tenants in common of the farm; and the defense rests on that relation. Plaintiff's right to recover rests on his title. He was lawfully in possession, and had the right to cultivate the ground, sow and harvest the oats. They were the product of his own labor rightfully performed; in doing this he was in no respect the bailiff of his co-tenants. The product was his, and his right of action against those who took it away is supported. 21 Am., 296.

The trial court held and charged the jury to the effect that when plaintiff entered upon the portion of the meadow on which he cut the grass he took possession of that part of the premises and by force of it acquired the title to the grass which he cut, that he had the right to protect such possession and the title he derived to the grass mowed there by him.

Held, That this proposition is a legal assumption that this was an ouster of the co-tenants from that portion of the farm and that the possession of plaintiff became ad-

verse to them, but for the purposes of this case defendant House must be treated as a tenant in common of the grass or hay in question, as growing grass, like trees, is part of the realty until severed, and unlike other farm crops it is in some sense a self supporting production and the hay therefore not the product of the labor of plaintiff, and he acquired no right of property by the mere act of severing it from the land. The trial court was in error in holding that plaintiff by means of taking possession of the ground upon which it stood and severing it from the land acquired a title in exclusion of defendant.

Judgment reversed and new trial granted, costs to abide event.

Opinion by *Bradley, J.*; *Barcker, J.*, concurs; *Smith, P.J.*, not voting.

RAILROADS. FENCES.

N. Y. SUPREME COURT. GENERAL TERM. THIRD DEPT.

John D. Graham, *respt.*, v. President, etc., of the D. & H. C. Co., *applt.*

Decided Nov., 1887.

Defendant's railroad ran through a rocky cut, one side of which bounded plaintiff's pasture lot. Defendant never erected a fence along the cut. Plaintiff's horse, being in said lot, fell into the cut and was killed. *Held*, That defendant was liable, having neglected the statutory duty to maintain a fence, prescribed by § 8, Chap. 282, Laws of 1854.

The action was in form for negligence. *Held*, That the action could be maintained in this form.

Action for negligence. Plaintiff owned and used as a pasture a lot adjoining defendant's railroad. There was a deep rock cut through which the railroad passed along part of the lot. Defendant did not erect or maintain a fence on the side of the railroad where the cut was. Plaintiff's horse being in the pasture lot fell into the cut and was killed. The statute, Chap. 282, § 8, Laws of 1854, requires a railroad corporation to erect and thereafter maintain fences on the sides of its road of the height and strength of a division fence as required by law. Plaintiff recovered.

E. Young, for applt.

W. H. Tefft, for resp't.

Held, That defendant was guilty of negligence in not performing its statutory duty. 13 N. Y., 53. It owed this duty both to the public and to the plaintiff—to the public in the interest of the lives committed to its care, and to plaintiff in order to protect him in the enjoyment of his land and stock. Plaintiff had various remedies, 81 N. Y., 190; 76 id., 294; 97 id., 245; 41 Hun, 80, which he could invoke. The form of the action may not be material. Negligence was charged. And as defendant owed a duty to the public the law imputes negligence upon the failure to perform a statutory duty.

Defendant relies upon a provision of the statute above cited, which says that so long as such fences shall not be made and when not in good repair the corporation shall not be liable for damages which shall be done by the agents

or engines of the corporation to any cattle, horses, etc. Defendant insists that it is liable only for damages done by its agents or engines and cites 99 N. Y., 25, but in that case the plaintiff was not the owner or occupier of the adjoining land. Cases are also cited that where the remedy is a statutory one and a new right is given, and specific relief is prescribed for a violation of that right, the remedy is confined to that which the statute gives. Here no new remedy is given, but perhaps a new duty is enjoined. This duty is for the benefit of the public as well as for the owner. Violation of a public statute is legal negligence. 46 Hun, 567; 2 Keyes, 154, 162. It is not clear, however, that the statute imposes a new duty. The legislature conferred the right to construct and operate the railroad and therewith enacted the statute in question to impose a duty regulating the right. The right and duty go together.

Judgment affirmed.

Opinion by *Landon, J.*, *Parker* and *Potter, JJ.*, concur.

REFERENCE.

N. Y. SUPERIOR COURT. GENERAL TERM.

Charles Robinson, *respt.*, v. The N. Y., L. E. & W. RR. Co., *applt.*

Decided Dec. 12, 1887.

It sufficiently appearing herein from the pleadings and the bill of particulars that the examination of a long account would be directly involved in the trial, and it

also appearing from the record that no difficult questions of law were presented. *Held*, A proper case for a reference of the whole issues, including those made by the counterclaims.

Appeal from order of reference.

The complaint alleged the execution of a contract, whereby defendant agreed to hold plaintiff harmless from all claims, demands and suits which might be brought against him on account of certain transactions therein alleged, and that defendant would indemnify and reimburse him (plaintiff) for all expenses he might be put to, or compelled to pay, on account of the transfer of certain stocks therein referred to, or claim of ownership thereto; that, subsequent to the execution of such agreement, certain actions were brought against plaintiff on account of the ownership of said stock, and that plaintiff requested defendant to assume the defense of said actions, but that defendant authorized and requested plaintiff to defend such actions, and agreed to assume the expenses of such defense; and that plaintiff paid for the expenses of such defense the sum of \$13,177.70, for which he asks judgment. In response to a demand of defendant, plaintiff served a bill of particulars of his claim, showing twenty-four items of money paid by him from May 19, 1878, to March 8, 1882. The answer put in issue the employment by plaintiff of attorneys and counsel to defend such suits, and the payments made by him. Defendant claimed that § 974 of the Code requires that the counter-

claims set up in the answer must be tried either before the court or by a jury. The first counterclaim alleged that the agreement set up in the complaint was obtained by fraud, and asks judgment that it be canceled, etc. The second counterclaim realleged the ground for the relief asked for in the first counterclaim, and demands judgment therefor for sixty thousand dollars.

Abbett & Fuller, and *H. Schmitt*, for applt.

Burnett & Whitney, for resp't.

Held, That plaintiff to recover the amount demanded will have to prove each item set up in his bill of particulars, and also that the same was paid in the defense of the suits mentioned in the agreements; that the case of *Welsh v. Darragh*, 52 N. Y., 592, is sufficient authority for an order referring all the issues in this case. The fact that an examination of an account will be involved in the trial of the issues is apparent from the pleadings and the bill of particulars. It is not necessary that the fact that an examination of a long account is involved should be shown in any particular manner; where it does so appear, either by the pleadings or by affidavit, the court may refer.

The case of *Camp v. Ingersoll*, 86 N. Y., 334, is not in conflict with this decision. The record shows no difficult questions of law.

Order affirmed, with \$10 costs and disbursements.

Opinion by *Ingraham, J.*; *Sedgwick, Ch. J.*, and *Freedman, J.*, concur.

TRUSTS. PARTITION. COSTS.

N. Y. COURT OF APPEALS.

Moore et al., *appls.*, v. Appleby, *respt.*

Decided Jan. 17, 1888.

An action of partition was brought by a trustee under a will in which the remaindermen were not made parties. *Held*, That the remaindermen were not concluded by the judgment.

One who contracts to purchase the property from the purchaser at the sale thereunder should not be compelled to complete his purchase and is entitled to recover back the amount paid thereon.

In an action to recover back the money so paid an extra allowance should be based on the amount paid, and not on the value of the property.

Affirming S. C., 23 W. Dig., 5.

This action was brought to recover back a sum of money, paid on a contract for the purchase of certain real estate. The title offered to plaintiff came to defendant through the will of T. under proceedings in partition instituted by a trustee under said will. It appeared that certain parties entitled to the property in remainder were not made parties, and that the estate in trust was mainly for the benefit of the *cestui que trust*.

A. H. Wagner, for *appls.*William Mitchell, for *respt.*

Held, That as to the remaindermen, the maxim "*res inter alios acta nemine dicibit*" applies, and the court below properly held that they would not be concluded by the partition judgment, 43 Hun, 368, the purchaser therefore should not be required to complete his purchase, as there was left a reasonable chance that the person

so interested might raise a question against his title, 45 N. Y., 248; 77 id., 518; 73 id., 355, and he was entitled to recover back the money paid in anticipation of performance by defendant of the contract to convey.

Also held; That plaintiff was entitled to an extra allowance on the amount paid by him and interest and his expenses in investigating the title, Code § 3253, Subd., 2; that being the only object of the action the value of the subject matter incidentally involved by the nature of the controversy was not material.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by Danforth, J. All concur.

GIFT. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

In re settlement of accounts of Hiram W. Babcock et al., admrs.

Decided Dec., 1887.

A policy of life insurance may be transferred by gift, though not witnessed by any written transfer, by an unqualified delivery thereof to the donee with the intent to vest the absolute title.

In a proceeding before the Surrogate's Court for the final settlement of the accounts of the administrators an administrator is a competent witness to give evidence of personal transactions between him and his intestate to show the administrators are not chargeable with alleged assets with which contesting creditors are attempting to surcharge their accounts.

Appeal by Tift, Weller & Co., creditors of the decedent, from de-

cree of the Surrogate's Court of Cayuga County.

Thomas Dunn, Jr., obtained a policy of insurance on his life of date of July 10, 1885, payable to his estate or assigns. He died Sept. 26, 1885. His mother, Catharine Dunn, claimed that she had title to the policy by transfer from him to her on July 20, 1885, presented proofs of his death and her claim. The money was paid by the company and deposited in a bank to await the determination of the claim to the fund in conflict. The decree of the surrogate is to the effect that the policy was given by the son to his mother; that she was the owner of it and entitled to its proceeds, and that the administrators were not chargeable with them. The creditors, the firm of Tift, Weller & Co., and no others, appeal. Catharine Dunn was a party to the proceeding.

Charles M. Baker, for applts.

George Underwood, for admrs., respts.

James Lyon, for respt. Catharine Dunn.

Held, That the evidence was sufficient to support the conclusion of the surrogate that the policy was by delivery transferred to Catharine Dunn as an absolute gift, and received by her as such. No written transfer was necessary, but the unqualified delivery of the policy to her for the purpose of vesting title in her was sufficient to produce that result. 68 N. Y., 625.

Thomas Dunn was called and examined as a witness on the part of the administrators and gave

evidence of conversations had by him and Mrs. Dunn with the decedent, to which objection was taken that it was incompetent within § 829, Code Civ. Pro.

Held, That this objection was not well taken. The witness was one of the administrators, and the evidence was taken in behalf of the administrators, not against them, and was offered as tending to prove that they were not chargeable with the proceeds of the policy, and was competent. 92 N. Y., 240; 103 id., 374. We are not prepared to hold that the creditors of the decedent have the relation of persons deriving title through or under him within the meaning of the statute so as to enable them to raise the objection as against evidence offered in behalf of the administrators, but give no opinion on that question.

Decree of Surrogate's Court affirmed, with costs payable out of the estate.

Opinion by *Bradley, J.*; *Smith, P.J.*, *Barker* and *Haight, JJ.*, concur.

CONSTITUTIONAL LAW. TAXES.

N. Y. COURT OF APPEALS.

Ensign et al., applts., v. *Barse et al.*, respts.

Decided Nov. 29, 1887.

Chapter 387, Laws of 1883, in relation to tax deeds in Chautauqua and Cattaraugus Counties, is not unconstitutional.

It does not make the tax deed conclusive evidence of a complete title, but leaves the owner full right to assail the proceedings in any jurisdictional respect. An omission of the dollar mark in the tax

roll and warrant is not a jurisdictional defect; neither is a failure of the assessors to sign the roll when the certificate is signed.

There is no provision of law requiring the number of the road district or date of the commissioners warrant to be stated in the assessment roll in the assessment of a highway tax.

This action was brought to recover possession of certain lands being the south 156 acres of lot No. 1, Section No. 5, Township No. 1 in the fourth range of the Holland Land Company's survey, situated in the county of Cattaraugus. It appeared that the lands in question had been sold by the comptroller in 1843 and by the county treasurer in 1852. Various defects in the proceedings are disclosed, which the plaintiff claimed invalidated the resulting conveyances.

Chapter 287, Laws of 1882, provides that where 15 years have elapsed after a conveyance by a comptroller or county treasurer of land in Chatauqua or Cattaraugus County, belonging to non-resident owners, and such owners have not entered actual possession of the same and made permanent improvements the deed or conveyance should be "conclusive" evidence that "the sale and all proceedings prior thereto, from and including the assessment of the land, and all notices heretofore or hereafter required by law to be given previous to the expiration of the time allowed by law to redeem, were regular and were regularly given, published and served according to the provisions of all laws requiring and directing the

same or in any manner relating thereto." This act is entitled "an act to amend Chap. 229, Laws of 1879, entitled 'An act in reference to the collection of taxes in the county of Chatauqua and Cattaraugus' and the acts amendatory thereof and supplementary thereto." It amends § 32, of the Act of 1879, by making the deeds of the comptroller, county judge, and treasurer, presumptive evidence of regularity in all cases, and conclusive evidence of regularity in some. It is claimed that more than one subject is embraced in the act, and so it violates § 16, Art. 3 of the Constitution.

William F. Cogswell and E. D. Northrup, for applts.

John G. Hall and D. H. Bolles, for respts.

Held, Untenable; that the one subject of the bill is the collection of taxes in the two counties named. That fairly covers the entire system of collection. The sale of the lands enforces the collection. The deeds give effect and vitality to the sale, and their force as evidence and as muniments of title, is a natural and essential element of the system. 99 N. Y., 588. The act of 1882 contains contains nothing which one reading the title might not reasonably and naturally expect to find in the statute as within its scope. 94 N. Y., 505.

Also held, That the Act of 1882, does not make the tax deed conclusive evidence of a complete title, but leaves open to the owner full right to assail the proceedings in any jurisdictional respect.

The sale of 1852 was made for the county and highway tax of 1849. It is objected that the amount of the tax is not expressed in dollars and cents. This objection was founded upon the absence of the dollar mark in the statement in the tax roll and warrant of the amount of the tax.

Held, That this was not a jurisdictional defect. 14 Abb. N. C., 378; 96 N. Y., 670.

It was also objected that the assessors did not sign the roll. The statute then in force, 1 R. S. Pt. 1, Chap. 13, Tit. 2, Art. 2, § 26, required that the assessors should sign the assessment roll, and attach a specified certificate which they should also sign. In the present case the certificate was signed but the roll was not. The certificate referred to and identified the roll and was attached to it. It spoke of it as the "above assessment roll," and as having been the work of the assessors.

Held, That this was not a jurisdictional defect, or beyond the reach of the Act of 1882.

That part of the certificate which relates to the mode of valuation contains the words "solvent creditor" instead of "solvent debtor."

Held, That this defect was not jurisdictional.

It was also claimed that the sale was invalid because the assessor's certificate from its date indicated that it was made Aug. 4, 1849.

Held, That this was a defect in the nature of an irregularity.

It was also held that the assess-

ment was void because no number of the roll, district or date of the commissioner's warrant was given.

Held, That there is no provision of law which requires these details to appear on the assessment roll.

It is also objected that the notice of the tax sale was required by the Act of 1850, then in force, to be delivered to the printer for publication on or before Sept. 1, 1852. It was dated Sept. 15, 1852. The day of sale was the first Tuesday in December. The notice of sale was published once each week for the prescribed ten weeks.

Held, That the defect was not jurisdictional or beyond the remedy of the Act of 1882.

It was claimed that under § 1 of the Act of 1835, which provides that "real property of non-resident owners improved or occupied by a servant or agent shall be subject to an assessment of highway labor, and at the same rate as the real property resident owners." The land in question was not assessable for highway purposes.

Held, Untenable; that this provision was simply to provide that the lands of non-residents occupied or improved by them, their agents or servants, should be assessed in the same manner as resident lands, and to leave lands of non-residents not so occupied or improved to be assessed as provided for by the former statutes.

The sale of 1852 was made when the Act of 1850 (Chap. 298), was in force; that act repeals certain provisions of the Revised Statutes, but with the proviso that such re-

peal should affect "any tax levied or assessed prior to the year 1849, nor any proceeding for the collection thereof by a sale of the lands taxed or otherwise." Before the passage of the Act of 1850, the lands here in question had been returned to the comptroller as non-resident land upon which the taxes remained uncollected.

Held, That the Act of 1850, did not affect taxes assessed prior to 1849, but simply changed the future and prospective course of such proceedings, and a sale under such act was valid.

Whitney v. Thomas, 23 N. Y., 581, distinguished.

Judgment of General Term, affirming on verdict for defendant, affirmed.

Opinion by *Finch, J.* All concur.

ATTORNEYS. RESTITUTION.

N. Y. COURT OF APPEALS.

Forstman, *respt.*, v. Schulting, *exrx.*, Smith, *applt.*

Decided Jan. 17, 1888.

Where a party or his attorney, through aid of the court, have come into possession of property or money during a litigation which subsequent proceedings show was wrongfully acquired or unjustly retained, they may be compelled to restore it by order and attachment, even though it was received by the attorney as costs.

In the above entitled action defendant obtained an order at Special Term awarding certain costs against plaintiff, which were paid. Upon appeal the General Term reversed so much of the order as awarded costs, in excess

of those allowed upon a motion, and ordered the defendant to repay such excess within five days after service of its order. S., defendant's attorney, upon being served as required promised at various times to repay the costs, but having failed to do so an application was made to the General Term to compel such payment. It made an order requiring S. to make restitution of such costs, unless the same should be paid within twenty days by defendant, or unless S. should make and file an affidavit that said costs had been paid over by him to his client. S. did not avail himself of the terms extended and appealed to this court from the order.

Nathaniel C. Moak, for *applt.*

Mathew Hale, for *respt.*

Held, That the order was properly made and should be enforced; that courts may exercise summary jurisdiction over the conduct of parties and attorneys in actions pending before them and may enforce obedience to orders and directions made in the interest of fair dealing and honesty to protect the rights of all parties or persons affected by the litigation. Both parties and attorneys who through the aid of the court have come into possession of property or money during a litigation, which subsequent proceedings in the action show was either wrongfully acquired or unjustly retained, may be compelled to restore it to the rightful owner by order and attachment to enforce such restoration. 14 Abb. Pr. N. S., 249; 15 *id.*, 86; 55 N. Y., 641.

Langley v. Warner, 3 N. Y., 327, distinguished.

Also held, That the fact that the money received by S. was received as costs does not help him as its wrongful acquisition and retention authorized the court to order its restoration.

Order of General Term affirmed.

Opinion by *Ruger, Ch. J.* All concur.

MASTER AND SERVANT. SERVICES.

N. Y. COURT OF APPEALS.

Fuchs, respt., v. Koerner, applt.

Decided Dec. 13, 1887.

An employee who has been discharged without fault on his part but is ready at all times to perform on his part, is not bound to accept employment of a kind different from that he had undertaken. Affirming S. C., 22 W. Dig., 143.

This action was brought to recover damages for breach of contract of hiring. On Feb. 9, 1884, defendant engaged plaintiff "for his business in essential oils and essences for one year, from Feb. 6, 1884, for the yearly wages of \$1,800, in weekly wages of \$37.50. Plaintiff served under that agreement until July 6, 1884, when defendant closed up his business and for that reason discharged plaintiff, who nevertheless reported daily to defendant and also sought employment elsewhere. Defendant offered to employ him in making and selling fancy boxes, this he declined but in fact earned \$15 in other ways. The court charged that it was plaintiff's duty to use reasonable diligence in

procuring another place of the same kind, in order to relieve the defendant as much as possible from the loss consequent upon his breach of contract but that he was not bound to accept occupation of another kind. This qualification was excepted to.

John D. Ahrens, for applt.

George L. Simonson, for respta.

Held, That the exception was not available; that plaintiff having been ready during the entire year to perform his agreement, could not be required to enter upon a new business or one different to the one that he had undertaken. 2 Den., 609.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Danforth, J.* All concur.

TRESPASS. LICENSE.

N. Y. COURT OF APPEALS.

Wheelock, respt., v. Noonan, applt.

Decided Jan. 17, 1888.

One who would justify under a license or permission must bring his acts under the terms of the license; he exceeds them at his peril. Courts of Equity will interfere under peculiar circumstances where a trespass is a continuing one and a multiplicity of suits at law are involved in the legal remedy.

Defendant, a stranger to plaintiff, obtained from him a license to place upon his unoccupied lots in the upper part of New York City a few rocks for a short time, defendant assuring him that he would remove them in the spring.

Nothing was paid or charged for the permission given. During the winter and in the absence and without the knowledge of plaintiff the defendant covered six of his lots with huge quantities of rocks, some of them ten or fifteen feet long and piled to the height of fourteen or eighteen feet. In the spring plaintiff ordered defendant to remove the rocks and he promised to do so, but has failed to keep his promise although repeated demands have been made upon him to do so. The court found as matter of law that the original permission did not justify what was done; that after its withdrawal in the spring and the demand for the removal of the rock defendant was a trespasser, and the trespass was a continuing one which entitled plaintiff to equitable relief. Judgment was awarded requiring defendant to remove the rocks before March 15, 1886, unless for good cause shown the time for such removal should be extended by the court.

L. Laflin Kellogg, for applt.

George A. Strong, for respt.

Held, That the finding of the court and the judgment were correct.

One who would justify under a license or permission must bring his acts under the terms of the license. He exceeds them at his peril.

A parol license founded upon no consideration is revocable at pleasure, even though the licensee may have expended money on the faith of it. 73 N. Y., 579.

Also held, That plaintiff was not

bound to remove the rocks and the bringing of an action at law to recover for the expenses incurred. 2 N. Y., 97. Plaintiff could have sued at law for the trespass but could only have recovered damages to date and for the subsequent continuance of the trespass new actions would have to be maintained. 101 N. Y., 98.

While ordinarily Courts of Equity will not wield their power merely to redress a trespass, yet they will interfere under peculiar circumstances and have often done so where the trespass was a continuing one and a multiplicity of suits at law was involved in the legal remedy. 73 N. Y., 579. Whether the trespass was such from the beginning or became one after a revocation of the license can make no difference as it respects the adequacy of the legal remedy. 4 M. G. & S., 236; 10 A. & E., 503; 86 N. Y., 128; 106 id., 142.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Finch, J.* All concur, except *Ruger, Ch. J.*, not voting.

GUARANTY.

N. Y. COURT OF APPEALS.

Schwartz et al., applts., v. Hyman, respt.

Decided Dec. 20, 1887.

The construction of a guaranty of payment is largely influenced by its precise language viewed in the light of the circumstances attending its execution. A letter requesting the sending to a third

party of a line of samples suitable for spring and summer and stating that the writer will guarantee payment of any goods that may be sold him is not a continuing guaranty.

This was an action upon a guaranty addressed to plaintiffs, dated Feb. 15, 1879. The guaranty states that the partnership between W. & P., will be dissolved by March 1, 1879, and requests plaintiffs to send P., "a full line of samples of course suitable for spring and summer at the lowest figures. And I will guarantee the payment of any goods you may sell him. Hoping you will comply with my request and attend to it at once you will oblige your friend." This guaranty was signed by defendant. In accordance with it plaintiff sent a line of samples to P., and they subsequently sold him goods in March and May, 1879, Aug., 1880, Feb. and Oct., 1881, and Feb. and Nov. 1882. All those goods were paid for. Between Aug. 9, 1883, and Nov. 12, 1883, plaintiffs sold and delivered to P., other goods which have not been paid for and this action was brought against defendant. Plaintiffs were nonsuited.

Blumenstiel & Hirsch, for appls.

William N. Cohen, for respt.

Held, No error; that defendant's letter did not constitute a continuing guaranty.

The language of a guaranty like the one in suit should be interpreted with the view of reaching the intention of the parties thereto, and while the guarantor should

be held to every obligation, fairly and reasonably embraced within the language he used, his language should not be strained beyond its obvious meaning for the purpose of enlarging his liability. 24 N. Y., 64; 73 id., 335; 93 id., 273. The construction of such a guaranty must always be largely influenced by the precise language used, viewed in the light of the circumstances attending its execution.

Judgment of General Term, affirming judgment for defendant, affirmed.

Opinion by *Earl, J.* All concur.

DECEIT. PLEADING.

N. Y. COMMON PLEAS. GENERAL TERM.

James McGlynn, applt., v. James M. Seymour, respt.

Decided Feb. 6, 1888.

Allegation that defendant, knowingly and fraudulently, sold and conveyed to a company, property, to which he had no title; that the company believing it owned the property issued stock; that plaintiff believing the stock valuable, bought some; that it was intrinsically worthless, though an apparent value was given to it by fictitious sales, known as "wash" sales, at the mining exchange, which defendant had made—it not being alleged that any transactions were had with, or representations made to plaintiff, other than as above, are insufficient to support an action for deceit.

Appeal from interlocutory judgment entered upon an order sustaining demurrer to complaint as not stating facts sufficient to constitute a cause of action.

Action for deceit.

The court at General Term, stated that the only part of the complaint that requires notice are the allegations that defendant, knowing that he did not own it, conveyed mining property to the company; that the company, believing itself to be the owner of the property, issued certain certificates of stocks; that plaintiff, believing these certificates to be valuable, bought some of them; that the certificates were intrinsically worthless, though an apparent but fictitious value was given to them by "wash" sales at the mining exchange, which defendant had made.

John H. Hamilton, for applt.

Hawksworth & Rankin, for respt.

Held, That these allegations cannot support an action against defendant. If they be true, defendant defrauded the company by selling to it property to which he had no title, but he did not have any transactions with plaintiff, nor did he make any representations to him directly, or through the medium of any other person or of any document. There is no foundation, therefore, for an action of deceit. Nor will the allegation that defendant caused "wash" sales to be made at the mining exchange sustain an action. A "wash" sale is at the most an affirmation that the buyer is paying a certain price for a certain lot of stock. It is not an affirmation that the stock has any intrinsic value, that a company owns any property of value, or that the buyer will ever again bid

the same price for the stock. It is made on account of persons who are anonymous. If a man buys stock because he is led by "wash" sales to believe that he can make a fortunate speculation, he cannot have an action of deceit against those who have made the "wash" sales. The sales, though fictitious, are not representations of any fact on which a man has a right to rely. They are at most false affirmations of an opinion as to value. Such affirmations are not regarded as statements of fact. "Wash" sales are condemned, as they ought to be, because they are fictitious, but they are not false representations, made to the public in general, which give a right of action to any one who is led by them to take an erroneous view of market prices and to invest unprofitably in consequence.

Judgment affirmed, with costs.

Opinion *per curiam*.

EASEMENT. LIMITATION. CORPORATION.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

Austin T. Miner, *applt.*, v. The
N. Y. C. & H. R. RR. Co., *respts*.

Decided Dec., 1887.

Where the authority given by the statute to appropriate lands for a public use is limited by the statute giving the power, the estate which may be taken cannot be enlarged without compensation to the owner.

But when such statute does not in terms so limit the use as to terminate it with the term of corporate existence, the use in the contemplation of the statute is not necessarily dependent on the corporate

existence as declared by the statute, and when the act defined the use for which such lands should be taken as an appropriation "for the use and accommodation of such railroad or its appendages," this use, the public use to which it must be devoted, seems to be the only qualification to the easement, and the time of the continuance of the use, so long as it is so used, is not limited.

Appeal from judgment entered upon decision of the court on trial without jury dismissing complaint.

Action of ejection brought to recover possession of land occupied by defendant and used as a part of its railroad in the county of Genesee, and of that portion originally taken and used by the Tonawanda Railroad Co., which was created by Laws of 1832, Chap. 241. The act provided that the company should continue to be a body corporate for the term of fifty years; that it should have the right to construct and during its existence to maintain and continue a railroad from the village of Rochester to Attica; that in case the corporation should not be able to acquire the title to the lands through which the railroad should be laid by purchase or voluntary assignment it should be lawful for it to appropriate so much of such lands as might be necessary to its own use for the purposes contemplated by the act, in the manner provided; and that the damages were to be assessed by appraisers appointed by the vice-chancellor of the eighth circuit; that the appraisers should assess the damages which each individual owner would maintain by the "appropriation of his land for

the use or accommodation of such railroad or its appendages," and in assessing such damages the appraisers should take into account the benefit which would accrue to such owner by means of the passage of the railroad through his lands; that on payment of the damages, etc., the corporation should "immediately become entitled to the use of the said lands for the purposes aforesaid," that if the legislature should at the expiration of ten and within fifteen years reimburse the company, etc., the "railroad with all its fixtures and appurtenances shall vest in and become the property of the people of the State;" and that the legislature might "at any time alter, modify or repeal" the act. The land in question was appropriated by proceedings *ad invitem* under the act, and the railroad was constructed and operated by the company, and afterward pursuant to the provisions of Chap. 236, Laws of 1850, authorizing it, the Tonawanda RR. Co. and the Attica & Buffalo RR. Co., were consolidated or amalgamated into a single corporation known as the Buffalo & Rochester RR. Co. and pursuant to Chap. 76, Laws of 1853, this and other companies were consolidated into a single corporation which took the name of the N. Y. C. RR. Co. and in Sept., 1869, this company and the H. R. RR. Co. were consolidated into one corporation having the name of the N. Y. C. & H. R. RR. Co., pursuant to Chap. 917, Laws of 1869, and the latter company has since that time operated the rial-

road embracing that portion upon the land in question. The act of under which the first consolidation was had provided that all and singular the rights and interests of the corporations in and to every species of property shall be deemed to be transferred to and vested in the new corporation; and that it should hold and enjoy the same together with the right of way and all other rights of property in the same manner and to the same extent as if the two corporations had continued to retain the title and transact the business of corporations; and that title and real estate acquired by either of them shall not be deemed to revert or be impaired by means of anything contained in the act, Laws of 1850, Chap. 235, § 4, and such were substantially the provisions and effect of the statutes under which the following consolidations referred to were had. The question presented relates to the estate in the land appropriated by the Tonawanda Company by the proceedings under the provisions of its charter and whether that estate was limited to a term of fifty years.

L. N. Bangs, for applt.

Geo. C. Green, for respt.

Held, That it must be conceded that the use provided for was limited by the statute to the purposes of a railroad; and if the use for which authority was given to appropriate the land to such purpose was limited by the statute delegating the power to any definite term it cannot lawfully be held by force of such appropriation for greater

than such period of time. The estate which may be taken for public use cannot be enlarged without compensation to the owner. So if the use which the company had authority to take through the power delegated to it was an estate for fifty years only, the legislature was powerless to enlarge it or to vest in the company any power to appropriate for its use any greater estate without additional compensation. Const., Art. 1, § 6.

That the act does not in terms so limit the use as to terminate it with the fifty years following the time of the incorporation of the company and the conclusion to that effect can result only from inference arising from the fact that the continued existence of the corporation by force of the statute is only fifty years. The use in the contemplation of the statute was not necessarily dependent on the corporate existence of the company declared by it, but, as may have been seen, the use might be continued beyond that time by the extended corporate life of the company or by a successor in interest. The act defined the use for which the land should be taken as an appropriation "for the use and accommodation of such railroad or its appendages." This use, the public use, to which it must be devoted, seems to be the only qualification of the easement which the company was authorized to take. The only purpose for which the power delegated could be conferred was a public use and to effectuate that

purpose the land was taken and used. This use is defined and limited to this public purpose, and not to any time otherwise, thereby thus limiting the use. It appears more in harmony with the legislative intent, and such we think is the reasonable construction of the act, that the use, which authority was given to appropriate, was that requisite for the purposes of the railroad, and was limited only to that defined, and to continue so long as it should be devoted to that purpose. The fact that the designated period of corporate existence of the company was fifty years, did not render in incapable of taking an estate greater than one for that number of years. 12 N. Y., 121.

Judgment affirmed.

Opinion by *Bradley, J.; Smith, P.J., and Barker, J.,* concur.

NEGLIGENCE.

N. Y. COURT OF APPEALS.

Young, *respt.*, v. The N. Y., L. E. & W. RR. Co., *applt.*

Decided Dec. 6, 1887.

Plaintiff attempted to cross defendant's tracks on foot. He passed between the two parts of a train that was separated, looked to the west and stepped on the track in front of an engine coming from the east and was injured. *Held*, That he was guilty of contributory negligence in not looking in the other direction.

This action was brought to recover damages for injuries received by plaintiff at one of defendant's crossings in the city of Binghamton. The defendant's road which had two tracks through said city

running east and west was intersected by Oak street running north and south. The south track was used for trains bound east, and the north for those bound west. There was a space between the tracks of about seven feet. Plaintiff was injured Aug. 24, 1881, at 6:15 p. m. At the time a freight train was standing on the south track headed east. This train had been cut in two at Oak street, leaving a space of about twenty feet for the passage on the street of people and teams. Plaintiff going north in the center of the street passed through this space and just as he stepped upon the north track was hit by one of defendant's engines going west and badly injured. Plaintiff at the time was in possession of all his faculties, on foot, entirely and unincumbered. There was a great preponderance of evidence that he could have seen the train for at least one-third of a mile before it reached Oak street, while he was passing over a space of about sixty feet until he came within about fifteen feet of the south track. Plaintiff testified that he looked while passing over that space and did not and could not see the approaching train. The north track was straight for at least one-half a mile toward the east and the instant plaintiff got upon the middle of the space between the two tracks, he could have seen a train approaching from the east for that distance. He was walking very rapidly, was perfectly familiar with the location and the use ordinarily made of the two tracks, and as he

crossed the opening between the cars of the freight train he looked to the west, and heedlessly stepped in front of the engine coming from the east.

O. W. Chapman, for applt.

S. C. Millard, for respt.

Held, That plaintiff being in a place of some peril should have taken some care to protect himself; that having failed to take an observation, the moment he crossed the south track so as to see whether he could cross the north track with safety, and for not doing so he is chargeable with contributory negligence, which bars his recovery. 75 N. Y., 530; 106 id., 369; L. R., 11 Q. B. Div., 213; 49 L. T. R., N. L., 739.

It appeared that at the time of the accident there was a brakeman on the south track in or near the opening of the two parts of the standing freight train whose duty it was to connect the two parts of said train when he should be signaled to do so. Defendant's evidence showed that the brakeman warned plaintiff and attempted to stop him. The evidence on the part of the plaintiff tended to show that the brakeman said nothing and made no sign to him. It did not appear that plaintiff knew he was a brakeman or understood that he was standing there to warn travelers on the street, or that he owed him any duty whatever.

Held, That the presence of the brakeman did not excuse plaintiff from looking out for his own safety.

Judgment of General Term, af-

firming judgment on verdict for plaintiff reversed and new trial granted.

Opinion by *Earl, J.* All concur, except *Danforth, J.*, dissenting.

COLLATERAL INHERITANCE TAX.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

In re appeal from assessment of the tax imposed by Chap. 488, Laws of 1885, against the legatees of and under the last Will and Testament of William Cager, deceased.

Decided Dec., 1887.

Where an estate is devised and bequeathed to one for life with power to impair or diminish it during her lifetime, an assessment made under the collateral inheritance law upon the interest of those entitled to what may remain, cannot be imposed during the existence of the life estate.

Testator died in 1886, and the order imposing the tax was made in Aug., 1887. The Act of 1887, which took effect in June, excepted the estate devised or bequeathed to an adopted daughter, and repealed the Act of 1885. *Held*, That the estate was not taxable.

Appeal from order of Surrogate's Court affirming the assessment of a tax.

The testator, Wm. Cager, died May 30, 1886. In the first clause of his will he devised and bequeathed all his estate, real and personal, to his wife, "to be used and enjoyed at her disposal during the term of her natural life." In the second clause, to his adopted daughter the use of one third of his estate during her life, "that

may remain at the decease of my wife." "The remaining two-thirds" of the estate, at the decease of his wife, to the heirs of said daughter, also the said one-third devised to her for life, after her death.

The surrogate, pursuant to Chap. 483, Laws of 1885, appointed an appraiser to determine the tax that should be paid upon the legacies and collateral inheritance, who made and filed his report, which was confirmed by the Surrogate's Court. The order assessing the tax was made on the 12th day of Aug., 1887. Chapter 713, Laws of 1887, amending Chap. 483, Laws of 1885, went into effect June 25, 1887, and exempted from the provisions of the original act children adopted in conformity with the statutes, etc., and repealed all acts or parts of acts inconsistent therewith.

A. P. Rich, for applt.

R. L. Drummond, Dist. Atty., for the county.

Held, That the amendatory Act of 1887 was applicable and that, therefore, the assessment imposed upon the life estate of the adopted daughter was unauthorized.

A majority of the court (Smith, P.J., Barker and Bradley, JJ.) were also of the opinion that the testator gave to his wife more than a life estate in the property, both real and personal, under the first clause of the will, and that the same may be something less than the absolute ownership or unconditional power of making disposition of the same; that the devisees and legatees mentioned in the

second and third clauses of the will were given so much of the estate of the testator as remained undisposed of and unused by the widow during her lifetime. That in disposing of the question presented by this appeal it was unnecessary to determine the nature and character of the limitations, if any which may be imposed on the widow in the use and enjoyment of the corpus of the estate, as the right to impair and diminish the same for any purpose whatever renders the assessment under the act premature during her lifetime. *Haight, J., contra.*

Order reversed.

Opinion by *Haight, J.; Smith; P.J., Barker and Bradley, JJ.*, concur.

NEGOTIABLE PAPER. SURETYSHIP.

N. Y. COURT OF APPEALS.

Powers, respt., v. Silberstein, impl'd., applt.

Decided Jan. 17, 1888.

Mere indulgence by a creditor of the principal debtor will not discharge the surety; there must be an agreement for an extension without the surety's consent on a valid consideration which precludes the creditor meanwhile from enforcing the debt.

Where there is a conflict of evidence as to whether such an agreement was made the question should be submitted to the jury.

This was an action upon a promissory note the consideration of which was a loan of \$1,500 made by plaintiff to the firm of J. & B. One of the inducements upon which the loan was made was that

J. & B. should take into their employment the son of plaintiff, the loan was in fact continued from the maturity of the note in April, 1881 to the time of the failure of J. & B. early in 1884, on payment by J. & B. of the annual interest, and that no demand of payment of the principal was made either of the makers or indorser until at or about the time of the failure of the firm and during this whole period plaintiff's son was continued in its employment. The trial judge refused to submit to the jury the question whether there was an agreement between plaintiff and J. & B., the makers of the note, made after its maturity without the consent of the indorser to extend the time of payment; there was evidence which tended to sustain this defense.

Jno. Hallock Drake, for applt.

Chas. Blandy, for respt.

Held, That the ruling was erroneous; that the question of extension should have been submitted to the jury.

Mere indulgence by a creditor of the principal debtor will not discharge the surety. There must be an agreement for an extension made without the consent of the surety upon a valid consideration, which precludes the creditor meanwhile from enforcing the debt against the principal thereby changing the position of the surety. 37 N. Y., 604.

Also held, That the burden of proving an extension was upon defendant, but it could be proved by circumstances, and the acts and conduct of the parties were admis-

sible to interpret the language if that was in any degree doubtful or obscure.

In case of conflict or when different inferences might be drawn from the evidence the question on which side the evidence preponderates is for the jury exclusively, subject to the power of the court to set aside the verdict and submit the question to a new jury. 105 N. Y., 179.

Judgment of General Term, affirming judgment for plaintiff, reversed, and new trial granted.

Opinion by *Andrews, J.* All concur.

AGENCY.

N. Y. COURT OF APPEALS.

Bickford, respt., v. Menier et al., applts.

Decided Dec. 13, 1887.

One who is sent by foreign principals to found and carry on a branch of their business in this country without special instructions and without a power of attorney, and who carries on business in his own name is not authorized to borrow money for his principals.

A power in an agent to borrow money on behalf of his principals must be practically indispensable to the execution of the duties really delegated in order to justify its inference from the employment.

Reversing S. C., 22 W. Dig., 118.

This action was brought to recover money loaned by plaintiff to one B., her brother, who was agent of defendants. It appeared that B., had been employed by defendants, who resided in Paris, to establish an agency for the sale of their goods, in the city of New

York. He testified that he came to the city of New York for that purpose in 1872 and continued in business there for defendants until 1882. During that time he made returns and received goods from defendants' London house. He brought no power of attorney with him. He opened a bank account in his own name and also carried on the business in his own name, and received from defendants a salary. From time to time he borrowed money from his sister. At the time of making these loans, B., did not represent that he was authorized to borrow for the defendants and no note or memorandum was given by him to plaintiff at the time of the loans.

S. P. Nash, for appls.

John B. Pannes, for respt.

Held, That B. was not authorized to borrow money for the defendants; that the evidence does not disclose any facts indicating an intention on the part of the defendants to vest B. with authority to borrow money in their names for the purposes of the business in which he was employed. 13 N. Y., 632; 34 id., 30.

No acts of an agent can be resorted to, to establish a power not within the terms of his commission, except those that were brought to the knowledge of his principals, and are approved and acquiesced in by them. 73 N. Y., 10.

B.'s duties were analogous to those of a factor and such an agent has no authority to borrow money in the name of his princi-

pal. 1 Pars. Cont's., 42 Note E., 1 Chitty's Cont's 11 Am. Ed., 293; 8 Wend., 294; 7 M. & W., 595.

Also held; That sufficient ground is not afforded for the inference of a power to borrow money by B., for defendants, by the fact that the loan proposed was convenient or advantageous, or more effectual in the transaction of the business provided for. Such a power must be practically indispensable to the execution of the duties really delegated, in order to justify its inference from the original employment. 64 Barb., 145.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed, and new trial granted.

Opinion by *Ruger*, Ch. J. All concur.

COUNTERCLAIM. PLEADING. DEMURRER.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Samuel K. Green, *respt.*, v. William A. Parsons, *applt.*

Decided Jan., 1888.

That the cause of action alleged in the complaint is a tort is no obstacle to setting up a counterclaim in the answer if it have the requisites provided in § 501, subd. 1, Code Civ. Pro., but it must be alleged that the matter set out as counterclaim arose out of the transaction which is the foundation of plaintiff's claim or that it is connected with the subject of it. If it does not contain such allegations the pleading will be held insufficient on demurrer although it might be treated as sufficient for the purposes of a trial.

Appeal from interlocutory judg-

ment entered on order of Monroe Special Term sustaining demurrer to the portion of the answer alleged as a counterclaim.

The complaint alleged a cause of action in fraud for inducing plaintiff to purchase an interest in the "United Chemical Company," advancing money and enlarging the business. The answer after putting in issue the material allegations of the complaint adds as "a second answer and defense and for a counterclaim" that he was the sole owner and in possession of the stock of the United Chemical Co. that plaintiff proposed to and did purchase an interest in the company which was sold by defendant to him in consideration of his undertaking that he had the requisite ability to do so and would take charge of and faithfully and diligently manage the business, for which he was to receive a compensation. The ability of plaintiff and the performance of his promise in other respects is negatived by the allegations of the answer and damages are alleged and demanded by defendant as a consequence.

Plaintiff interposed a demurrer on the ground, 1. That the counterclaim was not alleged as existing at the time of commencement of the action; 2. That it does not appear to be a cause of action arising out of the transaction set forth in the complaint or to be connected with the subject of the action; 3. That it does not state facts sufficient to constitute a cause of action in favor of defendant against plaintiff.

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S. E. Filkins, for applt.

Daniel N. Salisbury, for respt.

Held, That the first and last grounds of demurrer require no consideration, that the question arises whether the matter alleged comes within the statute defining a counterclaim, which may be a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action. Code Civ. Pro., § 501, Subd. 1. The fact therefore that the cause of action alleged in the complaint is tort is not any obstacle to setting up a counterclaim in the answer if it have the requisites of that provision of the statute, which only requires that it arise out of the transaction which is the foundation of the plaintiff's action or is connected with the subject of it. 93 N. Y., 552. There is no allegation in this count of the answer to the effect that the matter alleged as a counterclaim either arises out of the transaction alleged in the complaint or that it was connected with the subject of the action. Although it might for the purposes of a trial be treated as sufficient, or if not, amended as a matter of course, yet upon demurrer the pleading must be tested solely by its allegations and none will be implied to give it effect, and for that purpose each count must rest upon its allegations, only, for support and cannot depend upon another without distinct reference to them.

Judgment affirmed, with leave to defendant to amend his answer

within twenty days on payment of costs.

Opinion by *Bradley, J.; Barker, P.J., and Haight, J.,* concur.

APPEAL.

N. Y. COURT OF APPEALS.

The People ex rel. Breslin, *respt.*, v. Lawrence, *applt.*

Decided Jan. 17, 1888.

A justice of the Supreme Court is not a party aggrieved, nor does he represent those who may be aggrieved so as to entitle him to appeal from an order of General Term reversing his order and discharging a prisoner.

See S. C., 26 W. Dig., 521.

The relator was arrested under a warrant issued by a police justice issued in the city of New York, charging with sale of wines and liquors on Sunday in violation of the statute, and after pleading not guilty, was, upon *habeas corpus* before Judge Lawrence, remanded to custody. On the application of the relator the General Term allowed a writ of *certiorari*, directed "To the Honorable Abraham R. Lawrence, a justice of the Supreme Court of the State of New York," requiring him to return to that court the record of the *habeas corpus* proceedings. He did so and upon consideration had, the order of Judge Lawrence was reversed and the prisoner ordered to be discharged from custody. A notice was then served upon the relator's attorney, signed "E. Henry Lacombe, Counsel to the Corporation," which stated that "Abraham R. Lawrence one

of the justices of the Supreme Court appeals to the Court of Appeals from the order of the General Term" above described. The counsel in support of the appeal in this court, also described themselves as "Counsel to the Corporation."

The respondent claimed that the appellant has misconceived the statute, by which the jurisdiction of this court is regulated.

Noah Davis, for *applt.*

Rob't G. Ingersoll, for *respt.*

Held, That the appellant had no interest in maintaining the order appealed from and it does not affect any right peculiar to himself. He cannot be regarded in the light of a representative of parties who may be really interested, and as such "represent the substantial right of all parties who prosecute or defend in his name." There is no provision of law or practice which makes him a vicarious agent or officer. The Code of Civ. Pro., § 2059, vests that function in other officers, by declaring that "an appeal from a final order discharging a prisoner committed upon a criminal accusation, or from the affirmance of such an order may be taken in the name of the people or the district attorney." This provision took the place of § 70, part 111, 1 Chap. 14, Tit. 1, Art. 2, p. 573, R. S., which made it the duty of the attorney general to prosecute a writ of error in case of the discharge by the Supreme Court of a prisoner from a commitment upon a criminal accusation. Hence the appellant is not only not aggrieved, but is in no

sense entitled to represent those (if any there are) who have cause to complain of the order of the Supreme Court.

People ex rel. v. Gilmore, 88 N. Y., 626; Munsell's Case, 101 N. Y., 245, Lawrence's Case, 56 id., 182, distinguished.

Appeal dismissed.

Opinion by *Danforth, J.* All concur.

NEGLIGENCE. HIGHWAYS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Samuel T. Stacey, *respt.*, v. The Town of Phelps, *applt.*

Decided Jan., 1888.

In an action against a town for damages for an injury alleged to have been caused by the negligence of the commissioners of highways, although it cannot be held as a matter of law that the commissioners were free from negligence, but on the contrary they were guilty of negligence in some respect, this does not charge the town with liability unless it is seen that such negligence caused the injury in question.

The burden of proof is with the plaintiff to establish not only that the commissioners were chargeable with negligence, but that if they had not failed to perform their duty the injury would not have been sustained. This fact cannot rest in mere conjecture or speculation but must be founded on evidence.

The commissioners are required to use reasonable care for the safety of the traveling public in reference to the situation, but this does not impose upon them the duty to erect a barrier, when engaged in the lawful repairs of the highways against the fury of a team of horses running away.

When a highway has become dangerous without the fault of the commissioners it is the duty of such commissioners to warn persons traveling upon the highway of such dangers.

The warning required to protect a traveler is not such as would necessarily stop a runaway team, but this matter of warning has no application to an injury received by reason of a defect in the highway occasioned or continued, by the negligence of the commissioners.

Appeal from judgment entered on verdict of Ontario Circuit and from order denying motion upon the minutes for a new trial.

Action to recover the value of a horse, the death of which is alleged to have been caused by the negligence of the highway commissioners of the town of Phelps, and a recovery was had against defendant.

In April, 1886, a highway bridge over the outlet of Canandaigua lake was taken away by a freshet. The commissioners of highways afterward proceeded to erect a new one in its place, and for the purpose put in a new stone abutment on the north side of the stream. In doing so they caused an excavation of the earth, which left a space of four or five feet wide at the top and about six feet in depth outside of it. The abutment extended three feet above the surface of the highway. This was the situation on the night of Aug. 5, 1886, when the team of plaintiffs hitched to a wagon escaped from the driver, ran away and fell into this trench, which caused the death of the horse in question. The question is whether the evidence permitted the conclusion that the loss of the horse was occasioned by the negligence of the commissioners of highways. During the progress of the work upon the bridge there

was a place a short distance north from it where teams left the highway and forded the stream at another point which gave reasonable accommodation to the public travel, and until July 28 there was a derrick standing in the highway used in the construction of the abutment, which was finished, and on that day or the next after was removed and thereafter until after the time in question there was no physical interruption to progress to the place of injury nor was there anything to guide a team into the passage way, departing from the highway, other than the track there made by its use for travel.

Frank Rice, for applt.

E. K. Burnham, for respt.

Held, That upon the theory on which the action was tried and submitted to the jury, and for the purposes of this review, the commissioners were properly proceeding with the construction of the bridge, and no negligence is attributable to them in respect to the manner in which they did it, or to the fact that the trench referred to was then remaining unfilled, and while it cannot be held as a matter of law that the commissioners were free from negligence, but on the contrary their omission to place some guard or warning at a suitable place to stay the passage in the highway to the trench justified the conclusion that they had failed to perform their duty in that respect, and were chargeable with negligence, this however does not charge defendant with liability unless it may be

seen that such negligence caused the accident in question. Here arises the important question in the case.

That the burden of proof was with plaintiff to establish not only that the commissioners were chargeable with negligence, but that if they had not failed to perform their duty the injury would not have been sustained. This fact cannot rest in mere speculation or conjecture, but must be founded upon evidence which permits the jury to reach that conclusion; 105 N. Y., 202. The commissioners were required to use reasonable care for the safety of the traveling public; and in respect to the situation caused by the removal and the process of construction of the bridge their duty was in a suitable manner to guard the traveler against the danger incident to it, which did not impose upon them the necessity to erect a barrier against the fury of a team of horses running away without restraint.

That there must, in a legal sense, be some boundary to the requirements of their official action, and that may be defined by the purpose for which their duties are to be performed, which is to use reasonable care in keeping the roads in a condition of safety for the public travel, and in warning the traveler against dangers that may exist there. If the officers, in respect to a dangerous condition, while it continues without their fault, must do more than is requisite to warn persons traveling upon the highway, there is no

line of limitation of their duty in that respect nor any qualification of liability when the plaintiff is free from negligence, but the question becomes one of fact for the jury. Such cannot be the rule.

That the warning required to protect the traveler was not necessarily such as would stop a runaway team of horses and save them from injury, and to charge defendant. The injury must have been caused by the neglect of the officers to do that which the law imposed upon them as a duty. All that was necessary for a traveler was timely and sufficient notice of danger. This matter of warning has no application to an injury sustained by reason of a defect in the highway occasioned or continued by the negligence of such officers. Liability may in such cases arise from an injury suffered to a team which has escaped and is running away, because it is produced by the negligence of the officers or municipality charged with the duty of keeping it in repair.

Judgment and order reversed and new trial granted.

Opinion by *Bradley, J* ; *Barker, P.J.*, and *Haight, J.* concur.

APPEAL. PRACTICE.

N. Y. COURT OF APPEALS.

Porter et al., *respts.*, v. Smith et al., *applts.*

Decided Dec. 13, 1887.

To entitle the appellant to have the ques-

tions of fact reviewed by the Appellate Court the case must contain a statement that it contains all the evidence given on the trial.

Affirming S. C., 21 W. Dig., 310.

This action was brought to recover back an excess claimed to have been paid to defendants on a contract made with them for the purchase of certain coal dust. A judgment was rendered for plaintiffs. The General Term refused to review the questions of fact sought to be argued by the appellants, on the ground that the case as made did not contain a statement that all the evidence given upon the trial was that set forth within it.

Louis Marshall, for applts.

M. M. Waters, for respts.

Held, No error; that such a statement was necessary, 39 Hun, 193; 20 id., 472, and is justified by § 992, Code of Civ. Pro., which forbids exceptions to findings of fact, and permits them to be raised without exceptions.

Judgment of General Term, affirming judgment for plaintiffs, affirmed.

Opinion by *Finch, J.* All concur, except *Ruger, Ch. J.*, not voting.

REPLEVIN. PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Edward H. Avery, *respt.*, v. A. Warren Mead, *applt.*

Decided Dec., 1887.

Where the complaint merely alleged that plaintiff was lawfully possessed of the goods, etc., and the answer contained a general denial and averred a seizure of the goods under an attachment as the property of another, and that any pretended transfer to plaintiff was made in fraud of creditors, *Held*, that as plaintiff omitted to set forth his title or right of possession as mortgagee, defendant was not required to allege in his answer the facts relied upon as showing that the mortgage was fraudulent. That the general denial put in issue the title or right of possession, and defendant had a right to show any facts that would sustain the answer.

Appeal from judgment entered upon verdict.

Replevin for personal property seized by defendant as sheriff, under an attachment issued in an action by *Ross v. Beck*. Beck purchased of *Ross* \$1,000 worth of boots and shoes, stating that he had a cash capital in his business and that plaintiff agreed to loan him \$1,000 without security to put into his business as a working capital. *Ross* then wrote a letter to plaintiff asking if this statement was true, who replied that he had agreed to help Beck to the extent of \$1,000 and that from information obtained in respect to his honesty, integrity and ability to pay, he had much confidence that he could and would make his business successful. Thereupon, in Nov., 1886, *Ross* delivered the goods. The bank of Auburn, of which plaintiff was president loaned Beck \$1,000, who gave a mortgage upon his goods in the store as security.

Feb. 1, 1887, Beck gave plaintiff his note for \$290 payable on de-

mand, consisting of \$50 for money loaned, the rent due for Jan., and the rent to become due in Feb., March, and April. Feb. 8, he executed a mortgage upon his stock in store as collateral security, which he gave at his own instance, and requested plaintiff to take immediate possession, which plaintiff claimed he did. Attachment was levied on the stock Feb. 16.

Plaintiff testified that he took possession of the stock Feb. 8 and caused an inventory to be taken; that he put Beck in charge as his agent, with direction to sell the goods and account to him for the proceeds, and to complete the unfinished work. Beck was called by defendant, and testified that he stated to *Ross* that he had, or was about to borrow \$1,000 from the bank of Auburn without security, and that he referred *Ross* to plaintiff for information as to the statement. Plaintiff's reply to *Ross*' letter was offered as bearing upon the question of fraud on his part in taking the mortgage. Objected to as incompetent and not pleaded, and sustained. Witness was also asked if he supported his family out of the proceeds of the sale of stock, between Nov., 1886 and Feb. 16, 1887. Objection sustained. Question, whether between Feb. 9 and 17, 1887, "did you sell any goods and chattels covered by plaintiff's mortgage on credit?" Objection sustained. Plaintiff contended that this evidence was incompetent because fraud was not pleaded.

Perkins & Hayes, for applt.

J. C. & J. C. Avery, for respt.

Held, Error.

The complaint merely alleged that plaintiff was lawfully possessed of the goods, without stating the source of his title or right to possession; and the answer contained a general denial and alleged that seizure under the attachment as the property of Beck, and that any pretended transfer of the goods to plaintiff was in fraud of creditors. Had the complaint set forth the source of his title and right to possession a different question would have been presented. But it not having been alleged, defendant was not in a position to set forth in his answer the facts showing that the mortgage was fraudulent. The general denial put in issue plaintiff's title or ownership, or right of possession, and he had a right to show any facts that would sustain the answer. 1 N. Y., 505; 35 Barb., 384; 7 Hun, 223.

He had the right to show that the mortgage was fraudulent; that it was fictitious, in whole or in part, and was given for the purpose of defrauding Ross out of his claim. He had the right to show by Beck that plaintiff agreed to loan him money without security, and that he made that statement to Ross to induce him to give him credit; that the loan was in fact made to him by the bank through Avery, its president; that no security was asked for or given at the time of the loan; that he gave the note and mortgage to plaintiff

for a claim fictitious in part, without any previous request on the part of plaintiff that he should do so, and procured him to take possession of the goods for the purpose of preventing Ross from collecting his claim. Also to show that there was no change of possession, but that Beck continued in possession of the goods the same as before, supporting his family out of the proceeds of sale, giving credit, and paying old debts as if he was the owner.

Judgment reversed and new trial granted.

Opinion by *Haight, J.*; *Barker* and *Bradley, JJ.*, concur.

EVIDENCE. DECEASED PERSON.

N. Y. COMMON PLEAS. GENERAL TERM.

Christian Ehrmann, applt., v. *Helen A. Schenermann, exrx.*, impled., *respt.*

Decided Feb. 6, 1888.

Under § 829, Code Civ. Pro., one who is made defendant in an action, but who was not served with summons and has not appeared, and against whom no judgment can be recovered on the demand in suit, may testify in behalf of a co-defendant as to transactions with plaintiff's decedent.

Appeal from judgment in favor of defendant Schenermann, entered on verdict.

Action on a promissory note, made by Frederick Ott, and endorsed by Philip Schenermann, as surety, and delivered to Charles S. Ehrmann, the payee, for value. Plaintiff claimed to be owner of the note, by purchase from his brother Charles. This was denied by said defendant who also set up payment by Ott, and a release of himself, as surety, by reason of a certain chattel mortgage given by the maker, and received by the payee, as security for the note. The payee died before this action. Philip Schenermann, the surety, died before trial, and the action was revived against his executrix. On the trial a chattel mortgage was produced executed by Ott, the maker of the note, to Ehrmann, the payee. There were what was claimed to be misdescriptions of the note in the mortgage, and Ott was called by defendant to prove that the mortgage was given to secure the note in suit, and also that he had paid the mortgage, by work done for the payee, in his lifetime. This testimony was objected to by plaintiff, on the ground that it related to personal transactions between the witness and a deceased person, and was incompetent under § 829 of the Code, whether he testified in his own behalf or on behalf of a co-defendant.

On the argument appellant's counsel relied on *Alexander v. Dutcher*, 70 N. Y., 385.

Thomas Brocken, for applt.

John S. Graber, for respt.

Held, That the above decision was rendered under § 839 of the

old Code; and that the legislature has made a distinction as far as co-defendants are concerned in the new Code, which provides, § 829, that such person shall not be examined as a witness "in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor," etc. In this case, Ott, although named as a defendant, was never served with the summons, and did not appear in the action. Neither was he examined as a witness on his own behalf, and his testimony was competent, in behalf of the defendant Schenermann under the Code as it stands, unless rendered incompetent by reason of his interest in the event of the action. He is not a party to it. No judgment can be recovered against him in it. The note became due in 1874, and no action can now be maintained by plaintiff or any transfer from him against Ott, on the note. The test of interest of a witness is that he will lose or gain by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. 88 N. Y., 285. Such interest must be present, certain and vested, and not remote or contingent. 35 Hun, 216; 62 N. Y., 80. Measured by these rules, the witness had no interest in the event of the action, and the testimony objected to was competent.

Judgment affirmed.

Opinion by *Bookstaver, J.*; *Larremore, Ch. J.*, and *Daly, J.*, concur.

ASSIGNMENT FOR CREDITORS.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Samuel Sloan et al., *appls.*, v. John E. Gauhn et al., *respts.*

Decided Dec., 1887.

In an action to set aside an assignment made for the benefit of creditors, upon the ground of fraud. *Held*, That as there was sufficient evidence in the case to sustain the findings of the trial court, that no fictitious claims had been fraudulently inserted in the assignment, nor any money or assets intentionally or fraudulently withheld by the assignor, this court could not say, notwithstanding circumstances of suspicion existed, that the findings were so clearly against the weight of evidence as to warrant a reversal of the judgment.

Appeal from judgment entered upon decision of Special Term.

Action by a judgment creditor of Gauhn to set aside an assignment as fraudulent. Defendant Gauhn was engaged in the business of plumbing, etc., and in Sept., 1886, he made an assignment to defendant Keeler for the benefit of creditors. It was claimed that there was intentionally and fraudulently withdrawn from the operation of the assignment a large sum of money and other assets for the purpose of defrauding plaintiffs; that certain debts set forth in the assignment were fictitious, and that the preferred claimants were inserted for the purpose of defrauding plaintiffs.

Gauhn's wife was preferred for \$175, which she loaned to him in March, 1880 and March, 1882, \$125 at one time and \$50 at the other

time. She testified that she drew the money from the bank, and that it was in part acquired from her own earnings as a dressmaker before her marriage with defendant. To corroborate her testimony the bank-book was presented showing the withdrawal of these sums at the times specified. His mother-in-law was preferred for \$425. It appeared that for several years she had lived in defendant's family, doing the housework under an express agreement made by the wife and approved by him to pay her \$2.50 per week, which, if true, would leave the sum named her due at the time of the assignment, after deducting payments made to her.

Keeler, the assignee, was preferred to the amount of \$524 for professional services, and his account just before the assignment was raised by increasing his charges for services rendered. In July, 1886, Gauhn conveyed to Keeler a house and lot, but it appeared that Gauhn had purchased the same at foreclosure sale at Keeler's request, and paid for the property with his money solely. It was also shown that Keeler's legal services were fairly and reasonably worth the additional sum charged by him.

It also appeared that within the week of the assignment Gauhn collected \$152 but did not turn any money over to the assignee, and it was not shown what became of this cash. But the evidence showed that he was a man of intemperate habits; that he had been upon long debauches, neg-

lected his business, and, it was claimed, that in this way he squandered much of his estate.

Horace McGuire, for appls.

Jas. B. Perkins, for respts.

HAIGHT, J.—There were several transactions, especially those with Keeler, that create some suspicion in respect to the good faith of the assignment; but the trial court, under the evidence, felt constrained to find that there had been no fictitious claims intentionally inserted, nor any intentional or fraudulent withholding or withdrawal of the money or assets by the assignor. There is sufficient evidence to maintain the findings of the trial court, and we cannot say, notwithstanding the circumstances alluded to, that the findings are so clearly against the weight of evidence as to warrant a reversal.

Judgment affirmed.

Smith, P.J., Barker and Bradley, JJ., concur.

NEGLIGENCE. EVIDENCE.

N. Y. COURT OF APPEALS.

Corcoran, respt., v. *The Village of Peekskill, applt.*

Decided Jan. 17, 1888.

The question of negligence must be determined on the facts as they existed at the time of the injury, and evidence of subsequent acts of the defendant is incompetent.

The act of a stranger cannot furnish legitimate evidence of negligence against a defendant,

This action was brought to recover damages for injuries received

by falling into an area in front of the house of G., on one of defendant's streets. Plaintiff against defendant's objection was allowed to prove that after the accident a fence was built around the area by the owner of the adjoining property which substantially protected travelers.

J. D. McMahon, for applt.

E. Countryman, for respt.

Held, Error; that the evidence was incompetent; that the evidence had no tendency to show that the area was not previously in a reasonably safe and perfect condition, or that the defendant ought, in the exercise of reasonable care and diligence, to have made it more perfect; that while such evidence has no legitimate bearing upon the defendant's negligence or knowledge, its natural tendency is to prejudice the jury and it should be excluded. 3 Hun, 338; 56 N. Y., 1. Whether defendant was negligent was a question to be decided upon the facts as they existed at the time of the injury, what it did afterward was immaterial unless its acts could be construed as equivalent to a declaration that it was negligent at the time of the accident. 9 Hun, 526; 56 N. Y., 1; 73 id., 468.

Also held, That the act of a stranger could not furnish legitimate evidence against defendant.

Judgment of General Term, affirming judgment on verdict for plaintiff, reversed, and new trial granted.

Opinion by *Earl, J.* All concur, except *Danforth, J.*, dissenting.

FIRE INSURANCE. MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Edward L. Thomas, v. The Montauk Fire Ins. Co.

Decided Dec., 1887.

Where a mortgagee insures the mortgaged premises for his own benefit, and at his own expense, and after a loss occurs discharges the mortgagor from all liability upon his bond and mortgage, upon receiving conveyance of the premises, and thus destroys the right of the insurer to be subrogated to the bond and mortgage, his right to recover upon the policy of insurance is defeated.

An action of foreclosure was discontinued by stipulation, plaintiff's attorney giving to defendant's attorney a receipt for the money, etc., containing the words: "this action to be discontinued and the bond in suit surrendered." Some time afterward the bond and mortgage were delivered to defendant's attorney, with an endorsement upon the bond: "Received, etc., in full of the within bond, etc., and the same is hereby surrendered and cancelled. But the insurance procured by E. L. Thomas * * * and any sum he may collect upon the same, is not affected by this surrender, but are and remain his property." The testimony was conflicting as to whether it was understood and agreed, at the time of the settlement, that plaintiff should retain or reserve the right to the insurance policy; but the court, relying upon the endorsement upon the bond, directed a verdict for plaintiff. *Held*, That the question should have been submitted to the jury.

Motion for new trial on exceptions taken to the direction of a verdict for plaintiff, ordered heard at General Term in the first instance.

Action upon an insurance policy. Plaintiff, as mortgagee, procured the policy upon the premises of E., the mortgagor.

An action to foreclose the mortgage was settled by paying partly in cash and giving a conveyance of the mortgaged premises, and the action was discontinued by stipulation, plaintiff's attorney also giving a receipt containing the words: "This action to be discontinued and the bond in suit surrendered." This was after the fire occurred. Some time afterwards the bond and mortgage were delivered to Benton, E.'s attorney, with this endorsement on the bond: "Received, etc., in full of the within bond and the debt thereby secured, and the same is hereby surrendered and cancelled. But the insurance procured by E. L. Thomas, at his expense and for his own protection, and any sum he may collect by reason of the same, is not affected by this surrender, but are and remain his property. E. L. Thomas."

Benton testified that at the time of the settlement the insurance policy was mentioned, and E.'s attorney said, "You know we have got a claim against the company. I replied that I had heard so, but had nothing to do with that; that this payment of the money and deed was to be in full satisfaction of all claims against E., who was to be relieved of all liability on his bond, and that was all I had to do with him; that I did not care anything about the claim against the insurance company, and this was said before I received the bond with the endorsement upon it. That there was nothing written on the back of the bond at the time they settled."

Plaintiff's attorney contradicted Benton's testimony, and further testified that in the conversation had with Benton at the time of settlement, he said that they did not intend to do anything that would effect their right to recover the insurance; that he had the bond lying on the table and had drawn the receipt upon the back of it; that he had it already prepared and dated, but that it was not to be delivered at that time because his client was not there to sign it; that subsequently his client came in and signed it, and that he then delivered it to Benton. Upon this evidence a verdict was directed in favor of plaintiff.

J. D. Lynn, for plff.

R. E. White, for deft.

HAIGHT, J.—This case has been considered by this court in reviewing a former trial. It was then held that the insurance company, upon paying the loss, took the right of subrogation *pro tanto*, and could enforce the bond and mortgage to that extent. 43 Hun, 218. Upon that review the case rested upon the receipt indorsed upon the bond, and this court was then of the opinion that the concluding clause thereof indicated an intention of the parties to reserve the insurance; but if, as is now claimed, the money was paid and the deed delivered in full satisfaction of the mortgage and bond, and with the understanding that E. was to be absolutely relieved from further liability on the bond, then it follows that the right of subrogation no longer exists, and

plaintiff by his agreement with E. having deprived the insurance company of that right cannot receive upon the policy. The question therefore is, what was that agreement? It is contended on the part of plaintiff that the agreement is evidenced by the indorsement made upon the bond; that E, having received the bond and retained it with the indorsement upon it, must be deemed estopped from now asserting that it does not disclose the agreement. If the bond with this indorsement upon it had been delivered at the time of the settlement and was all the evidence there was of the transaction upon that subject, the rule would doubtless be as claimed. 5 N. Y., 171. But the receipt given at the time of the settlement contains no reservation of the right to collect the insurance, but provides that the action is to be discontinued and the bond in suit surrendered, which, standing alone, would lead us to conclude that it was the intention of the parties to make the surrender of the bond absolute, and that E. was to be relieved from all liability thereon. We are consequently of the opinion, that as between these conflicting instruments it becomes the court to consider the circumstances under which they were executed and delivered, and what was done and said by the parties in reference thereto. Upon this subject, as we have seen, the evidence is conflicting, and the request of defendant to submit the same to the jury should have been granted; and the exception

upon such refusal renders a new trial necessary.

Motion for new trial granted.

Smith, P.J., Barker and Bradley, J.J., concur.

PROBATE. APPEAL.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

In re probate will of Lyman Soule, deceased.

Decided Dec., 1887.

Where, in proceedings to revoke the probate of a will, the names of the executors appear in the citation, but not in their respective character, and they appear solely as legatees and move to dismiss the proceedings upon the ground that they had not been served as executors, the citation may be amended by stating their representative character.

A recital in a decree admitting a will to probate that a certain person appeared by counsel and consented thereto, does not preclude such person in proceedings to revoke the probate from contradicting the recital and showing its falsity.

An order simply denying a preliminary motion to dismiss proceedings taken to revoke the probate of a will, does not affect a substantial right, and is not appealable.

Appeal from order of Surrogate's Court denying motion to dismiss proceedings to revoke the probate of the will of Lyman Soule, deceased.

A petition was presented to the surrogate to revoke the probate of said will upon certain grounds specified in the petition. A citation was issued to the individuals named therein, who were duly served, but the citation omitted to state the names of the executors as such, although their names are

first given in the citation and again appear among the list of persons entitled to notice. On the return day of the citation, the executors appeared solely as legatees under the will, and moved to dismiss the proceedings upon the ground that they had not been served as executors; and further that it appeared by the recital in the decree admitting the will to probate that the petitioner appeared by counsel and consented thereto. Motion was denied and appeal taken to this court.

H. W. Howland, W. E. Hughitt and M. A. Knapp, for applt.

W. B. Woodin, for resp't.

Held, That the surrogate had the power, and it was also his duty, to amend the citation by adding to the names of the executors their representative character.

The individuals who are executors were in fact served, and they are consequently not deprived of any substantial right, and the power to amend given by § 723 of the Code is expressly made applicable to Surrogate's Court by § 2538, 20 N. Y., 355; 13 Hun, 163; 16 id., 180; 89 N. Y., 22.

Held also, That the recitals in decree admitting the will to probate that petitioner appeared by counsel and consented thereto, do not preclude him from showing the contrary. Section 2647 of the Code gives to persons interested in the estate the right, within one year after probate, to petition for a revocation thereof. If the recitals were conclusive evidence of the fact recited, then any clerical error or mistake that may be made

in drafting the decree, or fraud practiced, would cut off an heir at law from the right to petition for a revocation. Sections 2651 and 2652 cited.

Held further, That the order did not affect a substantial right and was not therefore appealable. Sections 2570, 2371. The reviser's note to the article upon appeals from decrees and orders of the Surrogate's Court states that the practice is assimilated so far as possible to appeals in civil actions.

No final decree has been made in the proceedings to revoke the probate; the order appealed from merely denies the motion to dismiss; no costs were imposed, or other rights of the appellant affected. It may be that the surrogate will affirm the probate, and thus dispense with any necessity of reviewing this order.

Appeal dismissed.

Opinion by *Haight, J.*; *Barker* and *Bradley, JJ.*, concur. *Smith, J.*, not sitting.

LIMITATION. JUSTICE'S JUDGMENT. SUPPLEMEN- TARY PROCEEDING.

N. Y. SUPREME COURT. GENERAL
TERM. FIFTH DEPT.

Alice A. Davison et al., exrs.,
respts., v. Oliver Horn, *applt.*

Decided Jan., 1888.

After the expiration of the term of six years after the rendition of a judgment of a Justice's Court, the right of the judgment creditor to avail himself of the statute of limitations as a bar becomes a vested right, which cannot be defeated by legislation, and he cannot be

divested of that right by the filing of a transcript and docketing the judgment, and in view of § 414 of the Code of Civ. Pro. no reason appears why such bar may not be effectually asserted in any proceeding taken upon a judgment so docketed.

Appeal from order of Steuben County judge appointing receiver of defendant's property in proceedings supplementary to execution.

Judgment was recovered in justice's court July 15, 1879. Transcript was filed and judgment docketed in Steuben County clerk's office Aug. 11, 1886. Execution having been returned unsatisfied this proceeding was taken. Defendant was examined, and plaintiff's motion for the appointment of a receiver opposed and granted.

H. W. Sanford, for *applt.*

James Durkin and *D. M. Darrin*, for *respt.*

Held, The statute of limitations had furnished to defendant the right to bar a recovery upon the justice's judgment before the transcript was filed with the county clerk. Code Civ. Pro., § 382, Sub. 7. There is no express statutory limitation of the time within which such a transcript may be filed and judgment docketed, but it does provide that when that is done it becomes a judgment of the County Court, *id.*, § 3017. The policy of the statute however is to bar proceedings upon judgments of courts not of record after the expiration of six years from the time of rendition. And so far as limitation may be applied as a bar it is wholly statutory, and upon the statute only must such defense rest.

That the section first above mentioned by its terms relates to actions only, but the word "action" there used is by a subsequent provision of the statute "construed, when it is necessary so to do, as including a special proceeding or any proceeding therein, or in an action." *Id.* § 414, Sub. 4. The question, therefore, may be treated for the purpose of this review as if it were presented in an action upon the judgment in the County Court. This is a special proceeding taken upon the assumption that plaintiff has such a judgment for its support.

That the filing of the transcript and docketing of the judgment was a proceeding taken *ex parte* to charge defendant and his property without his consent. The right of the judgment debtor to avail himself of the statute of limitations as a bar became perfect before the transcript was filed with the clerk. And that right was a vested one which could not be defeated even by subsequent legislation, 41 N. J. L. R., 9; 2 Am., 700; 13 *id.*, 5; 7 *id.*, 239; 20 *id.*, 131; 86 N. Y., 580, and it is difficult to see how defendant could be divested of such right by the act of filing the transcript and docketing the judgment at the instance of the judgment creditor, inasmuch as the statute does not declare that it may be done after the time such right has accrued to the judgment debtor. In view of the provisions of § 414 before referred to of the Code no reason appears why such bar may not be effectually asserted in any pro-

ceeding taken upon the judgment so docketed, in which the judgment debtor has an opportunity to appear and be heard.

This view does not seem to have been considered in *Rose v. Henry*, 37 Hun., 397, and because that case was treated by plaintiffs as authority for causing the judgment to be docketed and for the proceeding taken and is not here followed they should not be charged with costs.

Order reversed.

Opinion by *Bradley, J.; Barker, P.J., and Haight, J.,* concur.

PERJURY. EVIDENCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

The People, *respts.*, v. Ransome H. Thornton, *applt.*

Decided Dec., 1887.

Upon the trial of an indictment for perjury in falsely testifying in an action for divorce that he, the prisoner, saw the defendant in a house of prostitution with P., and that he gave money to a girl for the purpose of illicit intercourse, P. testified on behalf of the prosecution, that it was false; whereupon, being recalled by the prisoner after the prosecution rested, he was asked whether he had not at a specified time and place, made statements that the fact was true; but the question was excluded. *Held*, That the question would be competent on cross-examination, and perhaps it was within the discretion of the court to exclude it at the time it was put, the objection was not placed upon that ground, and as the question bore upon the credibility of the witness, the prisoner was deprived of important testimony, and justice requires that a new trial should be granted.

It is the general practice in criminal trials,

when defendant's counsel has overlooked or forgotten evidence, to allow much latitude in permitting it to be called out in subsequent stage of the proceedings.

Upon a criminal trial for perjury in falsely testifying to the guilt of a defendant in an action for divorce, it is competent to show that the prisoner was intimate with the defendant's wife, as tending to show a motive for testifying against him.

Appeal from judgment entered upon verdict of conviction of the crime of perjury.

Defendant testified in an action for divorce brought against one Crandall, to the effect that he had seen him in company with Geo. Peckham in a house of prostitution, and that Crandall paid \$3.00 to a girl for the purpose of illicit intercourse. Peckham testified on behalf of the people that the testimony of defendant given in the divorce suit was entirely false. After the prosecution rested he was recalled by defendant, and was asked, "Did you on the occasion of the trial of the Crandall case, when Allen Peckham asked you if you had not previously told him that you and Crandall did visit a house of prostitution and that you had loaned Crandall \$2.00 and afterwards \$1. to go up stairs with a girl, say that you might have said so, that you did a great many things that you could not now recollect?" Question was ruled out and exception taken.

Norton & Church, for applt.

O. A. Fuller, Dist. Atty, for resp't.

Held, Error. Defendant was convicted chiefly upon the testimony of Geo. Peckham. If he

could have shown that he had made statements to the effect that defendant's testimony was in substance true, or if he even admitted that he might have made such statements but could not recollect, it would have an important bearing upon the credibility of the witness, the degree of faith and credit the jury should place upon his testimony.

This question was proper on cross-examination, and should have been then asked, and perhaps it was within the discretion of the court to exclude it at the time it was put, but it was not objected to on this ground, and it is the general practice in criminal trials, when defendant's counsel has overlooked or forgotten evidence, to allow reasonable, even liberal latitude in permitting it to be called out. The evidence excluded might have been important to defendant: it might have satisfied the jury that Peckham's testimony was unreliable and should not be believed. The Code of Criminal Procedure provides, that the appellate court may order a new trial if it be satisfied that justice so required, whether any exceptions shall have been taken or not in the court below. We cannot but feel that the trial court should have permitted the question to be answered, and believing that defendant has been deprived of important testimony, a new trial should be had.

A question was also raised in respect to the competency of the evidence as to defendant's intimacy with Crandall's wife.

Held, That the evidence was properly received by the trial court as tending to show a motive on the part of defendant for doing that which he was convicted of doing.

Judgment and conviction reversed and new trial ordered.

Opinion by *Haight, J.; Barker and Bradley, JJ.*, concur.

CONVERSION. ESTOPPEL.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

James H. Hughes, *respt.*, v. The United Pipe Lines, *applt.*

Decided Dec., 1887.

A judgment determining that plaintiff is the owner of a certain oil well drilled by defendant on lands leased by the former of the latter, precludes defendant or his bailee from questioning the title to the oil drawn from the well, in an action brought for the conversion thereof. And such judgment estops defendant or his bailee from showing that the well was drilled under an agreement that defendant should have one acre out of the leased territory in which to drill the well, and that it was done with plaintiff's permission.

An action for conversion may be maintained against a pipe line company, as bailee, to recover the value of certain oil drawn from a well owned by plaintiff, and stored in the pipes and tanks of the company, even though it has been commingled with other oils and its identity is lost.

Appeal from judgment upon report of referee.

Action to recover the value of a quantity of oil converted by defendant. The oil was the product of a well drilled by S., who ran it into defendant's lines for storage. S. was the owner of 200 acres of

land, and plaintiff was in possession of 75 acres under a lease for oil purposes, and when S. commenced drilling the well plaintiff notified him that he was upon the leased territory and must cease operations; but S. disregarded the notice, dug the well and claimed the oil as his own. Afterwards S. brought an action against plaintiff to determine the title to the oil well, and demanded judgment that it be decreed that the well was on his lands and not upon the land occupied by this plaintiff under the lease, etc. The referee found as a fact that the well was located upon the lands occupied by this plaintiff under his lease, and that the complaint should be dismissed, and judgment was entered accordingly. Plaintiff demanded the oil of defendant company, who refused to give it up. The judgment roll was received in evidence against defendant's objection. Defendant offered to prove new matter alleged in its answer, that before the completion of the well, and consequently before said former action was brought, it was agreed and understood between S. and plaintiff that S. was to have one acre out of the 75 acres occupied by plaintiff under his lease, on which S. put down the well, with his express permission. The offer was refused and the evidence excluded.

J. R. & M. B. Jewell, for *appls.*
E. D. Loveridge, for *respt.*

Held, No error; that the judgment in the former action was conclusive, and the referee properly refused to again try, the question

as to the ownership of the well. The rule is well settled that an allegation on record, upon which issue has been once taken and found and a judgment rendered is between the parties and their privies, conclusive according to the finding thereof so as to estop the parties respectively from again litigating the fact once so tried and found, whether it is pleaded in bar or given in evidence. 95 N. Y., 212; 98 id., 396.

An adjudication, when used as an estoppel in another action between the same parties upon the same claim or demand, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim on demand, but as to every other admissible matter which might have been offered for that purpose. Abb. Trial Evid., 828; 94 U. S., 351.

Defendant has no claim upon the oil except its fees for running and storage; it merely received it for transportation and storage, and is therefore in privity with S. The question in issue is as to the ownership of the oil; that depends upon whether the oil was produced from the lands of S. or those of plaintiff, and this was the identical question that was at issue, litigated and determined on the former trial. That action was brought for the purpose of determining who were the owners of the oil, for as to the well itself it had no value of consequence aside from its productions. The new matter set up in defendant's answer only bears upon the issue of the ownership of the well, and

this evidence, if existing, should have been produced upon the former trial. A party cannot be permitted to try his case by piecemeal.

It was also contended, that as the oil was run into the pipe lines and tanks of defendant and there commingled with other oils, its identity was lost, and this action could not be maintained.

Held, That an action for conversion would lie. The oil produced from the different wells in the same locality is of about the same grade and value. It is a fluid and consequently separable in respect to the quantity and quality, by weight or measurement; and the rule is that, in such cases, the owner may maintain assumpsit for the value of the goods, or trover, after a demand and refusal to deliver.

2 Schouler Pers. Prop. 48; 77 N. Y., 158; 21 Pick., 298; 51 N. Y., 70.

Judgment affirmed.

Opinion by *Haight, J.; Smith, P.J., Barker and Bradley, JJ.*, concur.

CONTRACT. DIVIDENDS ACCRUING.

N. Y. COMMON PLEAS. GENERAL TERM.

Clemantine Parks, *respt.*, v. Automatic Bank Punch Co., *applt.*

Decided Feb. 6, 1888.

The word "dividends" as used in banking, railroad and other business associations, is that portion of the profits which is set apart and divided by the managers

or directors of the corporation, among the stockholders. This separation and division is not a growth, but an act; and dividends cannot accrue until declared. The phrase "dividends accruing" used in the contract between the parties hereto, defined and applied in accordance with above principle.

Appeal from judgment of District Court for the first judicial district, New York City.

On Nov. 9, 1885, plaintiff assigned to defendant certain letters patent, and received in part payment therefor, thirty-five shares of capital stock of defendant, and on the same day defendant, as a part of the consideration, executed an instrument in writing, whereby it undertook and agreed "that the dividends accruing to party of second part (plaintiff) on the said thirty-five shares of stock, shall amount to at least the sum of \$219 on or before May 17, 1886, and to the additional sum of \$219 before May 17, 1887. No dividends were declared before May 17, 1886, and defendant on the 18th of that month, paid plaintiff \$219.

On Jan. 1, 1887, a dividend of five per cent on the stock was declared, and plaintiff received the dividend on her shares, amounting to \$175; and on her demand about May 17, 1887, defendant paid her the further sum of \$44, making the full sum of \$219 paid her, according to the terms of the agreement. In July, 1887, defendant declared a dividend of three per cent. on its capital stock. On plaintiff's thirty-five shares, this would amount to \$105. It however refused to pay her more

than \$25, on account of that dividend, claiming that she was entitled to only so much of the dividend as had accrued subsequently to May 17, 1887; and that it was entitled to retain the rest, because it had accrued before that day, and had been advanced to her by defendant in the former payments; and consequently, if the whole were paid to her, she would be paid twice for that portion of the last dividend derived from profits accruing between the 1st of Jan. and the 17th of May.

E. B. Conover, for applt.

Milnor & Willis, for resp't.

Held, That it cannot be denied that this would be the effect of giving her the whole dividend declared on July 1, 1887; but the question is whether such a result was not intended by the parties to the agreement. The intention of the parties must be deduced from the phrase "dividends accruing." The meaning of the word "dividends" as used in banking, railroads and other business associations, is that portion of the profits which is set apart, and divided by the directors or managers of the corporation among the stockholders. This separation and division is not a growth, but an act; and the dividend is said to be declared or made. Interest may be said to be accruing to the principal, and the same may be predicted of profits in a business, but not of dividends; they cannot accrue until declared. As the dividend of July, 1887, was not declared until after May 17, 1887, it did not

accrue to plaintiff's stock during the period covered by the agreement, and consequently we think she was entitled to the whole dividend.

Judgment affirmed, with costs.

Opinion by *Bookstaver, J.*; *Larremore, Ch. J.*, and *Allen, J.*, concur.

ASSIGNMENT FOR CREDITORS. CHATTEL MORTGAGE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John D. Dorthy et al., *appls.*,
v. William S. Servis et al., *respts.*

Decided Dec., 1887.

An assignee for benefit of creditors of the mortgagor cannot take advantage of the omission of a chattel mortgage of the assignor to file his mortgage as required by the statute nor claim that the same should for that reason be set aside in a suit prosecuted by him for that purpose under the Act of 1858, Chap. 8, 4. Nor can a judgment creditor of the assignor whose judgment was recovered after the assignment maintain an action to set aside the chattel mortgage upon the ground that the same or a true copy of it was not filed as required by the statute.

Appeal from a judgment entered upon the report of a referee dismissing the plaintiffs complaint with costs.

In Nov., 1883, Nendahl & Holwede executed and delivered to defendant Servis a chattel mortgage on personal property of which they were the owners to secure Servis as an accommodation indorser of their notes, requesting the mortgagee at the time not to place the same on file and the mortgage was not filed until Nov.,

1886, one month before the mortgagors made an assignment for benefit of creditors to plaintiff Graham. The assignee took possession of the assignor's property including the mortgaged property and remained in possession until Jan., 1887, when Servis without the consent of the assignee seized and removed the mortgaged property and advertised it for sale.

The only allegation in the complaint against the validity of the mortgage is that the delay in filing the chattel mortgage was intended to and did hinder, delay and defraud the creditors of the mortgagors in the collection of their debts, and the relief asked for in behalf of the assignee is that defendants be ordered to account for and deliver over to the assignee all the chattels so seized and removed by them and to account for the moneys, if any, received from the sale of the property.

The referee found as a fact that the mortgage was given and received without any intention on the part either of the mortgagors or mortgagees to hinder, delay or defraud the creditors of the mortgagors.

Geo. A. Cornahans, for *appls.*
Stuart & Sutherland, for *respts.*

Held, That the assignee as a trustee of the property for the benefit of the creditors of the assignors cannot take advantage of the omission of the mortgagee to file his mortgage as required by the statute and for that reason claim that the same should be set aside in a suit prosecuted by him

for that purpose under the provisions of the Act of 1858, Chap. 314. 33 Hun., 557; 43 id., 164.

That the finding of the referee on the question of fraud is equally conclusive on the plaintiff Dorthy and that the act of the judgment debtors in disposing of their title and interest in the property included in the chattel mortgage prior to the recovery of the judgments against them in favor of Dorthy deprives him of the relief he seeks in this action. As judgment creditor he sustained no such relation to the property included in the mortgage as would permit him to maintain an action to set aside the mortgage as void. 40 Hun., 516. Plaintiff must show that the removal of the alleged fraudulent obstruction will enable his judgment to attach upon the property. 90 N. Y., 538.

Judgment affirmed, with costs.

Opinion by *Barker, J.; Smith, P.J., Haight and Bradley, JJ.*, concur.

GIFT. PLEADING.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT

Samuel B. Williams, admr., v. Lucy A. Guile.

Decided Dec., 1887.

Plaintiff's intestate executed and duly acknowledged an assignment, reciting a consideration of a policy of insurance upon his life to the defendant, but reserving therein a power of revocation, and delivered it together with the policy to his attorney, with directions "to put them in his safe for Mrs. Guile, that it was her's, and if anything happened to him to give it to her," saying that she

had been in his family and had done so much for him that he was going to give it to her. *Held*, A valid gift in *presenti*; that there was a delivery of the instruments to the attorneys for the donee, subject to the right of revocation during the donor's lifetime.

Where the complaint admits that plaintiff's testator executed an assignment of the instrument claimed by the executor, to defendant, but denied its delivery, it is not necessary to allege affirmatively the title by assignment and delivery, the allegation of non-delivery being denied.

Motion for new trial by plaintiff upon exceptions taken and ordered to be heard at the General Term in the first instance.

Action to recover moneys received by defendant on a policy of insurance upon the life of plaintiff's intestate, and made payable to his executors, etc. By an instrument in writing, duly acknowledged, and reciting a valuable consideration paid, the intestate purported to assign and transfer said policy to defendant, but subject to the power of revocation during his life. Duplicates of this assignment were drawn and simultaneously executed, one of which was placed with the policy and delivered to W., the attorney for defendant in this action, with the direction "to put them in the safe for Mrs. Guile, that it was her's, and if anything happened to him to give it to her." W., after the intestate's decease, delivered the policy and assignment to defendant, who collected the money. W. was called as a witness by plaintiff, and testified that the intestate stated to him that Mrs. Guile had been in his family and had done so much for him

that he was going to give the policy to her; that he was the depository of the papers for Mrs. Guile, that he was to give them to no one else, but was to give them to her if anything happened to him. R. C. W. testified on behalf of defendant, that he was present and heard intestate direct the assignment and policy to be put in the safe of W. for Mrs. Guile; that it was her's, etc., and if anything happened to him to give it to her.

G. F. Yeoman, for plff.

Edward Webster, for deft.

Held, That the evidence being undisputed a verdict was properly directed for defendant.

Plaintiffs contends that there was no valid delivery of the assignment so as to pass the title to the policy to defendant; that it was left with W. so that he could take it back at any time he chose, and was not to be delivered until after his decease. But we are of the opinion that the delivery was sufficient to transfer the title. The reservation in the instrument of the right to cancel and revoke it, indicates that the intestate contemplated a delivery which would transfer the title; for if he only intended to leave the papers with W. subject to call, it was unnecessary to have the clause inserted giving the power of revocation, as that could be done by simply calling for the papers and taking them back into his own custody. Again, it will be observed that W. was not directed to withhold the papers from Mrs. Guile until intestate's death, but was directed to put them in the safe for her,

and if anything should happen to him to give them to her. 42 N. Y., 362; 13 Johns., 285; 80 N. Y., 422.

In the latter case, the court said that "To establish a valid gift a delivery of the subject of the gift to the donee, or to some person for him, so as to divest the possession and title of the donor, must be shown." In the case at bar there was a delivery of the assignment and the insurance policy to W. for Mrs. Guile, so that the case is within the rule as stated. There was an executed assignment of the policy duly delivered, subject to the right of revocation during the life of Andrews.

Defendant contends that there was a valid gift *causa nuntis*, under the authority of *Grymes v. Hone*, 49 N. Y., 17; but under the view we have taken of the case, it becomes unnecessary to consider this claim.

The complaint alleged the making of this assignment which was set out *in hæc verba*, but averred that it was never delivered. The answer admitted the allegations of the complaint, except that of the non-delivery of the assignment, which it denied, but contained no averment of assignment and delivery. Plaintiff rested without showing non-delivery of the assignment, and afterward objected to the assignment being offered in evidence although it was the same in terms as that set forth in the complaint, and admitted by the answer. Objection was overruled, etc.; defendant then gave evidence to show delivery.

Held, That the objection was properly overruled. It was not necessary for defendant to allege the assignment and delivery affirmatively. Delivery would be presumed from possession. 41 N. Y. Superior Ct., 435.

New trial denied and judgment ordered for defendant on the verdict.

Opinion by *Haight, J.*; *Barker* and *Bradley, JJ.*, concur. *Smith, P.J.*, not voting.

SCHOOLS. REMOVAL.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

Flora E. Dunavon, respt., v. The Board of Education of the Village of Hornellsville, applt.

Decided Jan., 1888.

Where power is conferred by statute upon a village school board to contract with, license and employ teachers, "and at their pleasure remove them," the power of removal is discretionary and no cause need be assigned therefor.

Appeal from judgment of County Court affirming judgment rendered in Justice's Court.

Action to recover wages which, it is claimed, were due plaintiff for services as teacher in defendant's school. Defendant was incorporated by Laws of 1873, and by § 10, Subd. 5, the board of trustees was authorized to "contract with, license and employ all teachers in said schools * * * and at their pleasure remove them." Plaintiff was employed "at \$30 per month for the time which you shall teach, subject, however, to the rules of the board;

term to commence Sept. 1st next." Plaintiff served one month, when, upon the report of the superintendent of the school that there was one teacher too many in the school, and that there were no pupils for her to teach, the board passed a resolution to the effect that the services of plaintiff be dispensed with, of which she was given notice. Plaintiff sought to recover the salary for the remainder of the school term.

The court below was of the opinion that plaintiff was not removable without sufficient cause shown.

Fay P. Rathbun, for applt.

D. L. Benton, for respt.

Held, Error. If the board could remove only for cause shown, their "pleasure" would in many instances be disregarded, for they may be unable to establish in the courts the charges made, and yet, at the same time, really believe that the teacher is physically, mentally or morally unfit to have the care and instruction of the pupils attending the school. The duty devolved upon the trustees is of a delicate nature; they are required to see to it that unfit or incompetent persons are not kept in charge of the children. The trustees are consequently often compelled to act upon moral conviction in cases where it may be difficult to establish a good and sufficient cause by common law evidence. For this reason the legislature, doubtless, in its wisdom, has seen fit to give the board the power of removal at pleasure. This view of the statute appears

to be supported by the authorities. Where an officer is appointed during pleasure, or where the power of removal is discretionary, the power to removal may be exercised without notice or hearing.

1 Dill. Mun. Corp., § 250; 73 N. Y., 437; 82 id., 491; 92 id., 191; 79 id., 582. See also, 6 Daly, 286; 58 Ill., 252; 82 Ind., 74.

The contract entered into with plaintiff is not inconsistent with the statute, and did not deprive the trustees of the power of removal at pleasure conferred upon them by the statute.

Judgment of County Court and of Justice's Court reversed.

Opinion by *Haight, J.*; *Barker, J.*, concurs; *Brailley, J.*, concurs in result.

SPECIFIC PERFORMANCE.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

James T. Vought et al., *appls.*,
v. Joseph S. Williams, *respt.*

Decided Dec., 1887.

A marketable title is one free from judicial doubt, or uncertainty as to matters of fact, and upon which possession may be acquired and retained without litigation or judicial decision. If a reasonable doubt exists in reference to any facts upon which the title depends, or such a doubt existed that the court would not be warranted in instructing a jury that the fact existed, or where the title depends upon a matter of fact not capable of satisfactory proof, a title is not marketable.

A contract to give a first class title means a clean record title, or at least one not depending upon presumptions that may be overcome, or facts that are uncertain. Where, therefore, plaintiff's title depended in part upon the death, unmarried and

without issue, of a young man who had been absent from home for a period of about twenty-five years, unheard from and believed to be dead, but whose interest in the property his mother and only brother assumed to convey to plaintiff, specific performance was refused.

Appeal from judgment entered upon decision of Special Term.

Action to compel specific performance of a contract made in 1886 to purchase real estate, the title to be first class and to be passed upon by a lawyer designated by defendant. The abstract of title showed that G. R., the original owner died leaving him surviving his wife and two sons, W. R. and G. R. Jr.; that in 1873, the widow and W. R. conveyed to plaintiffs their own interest in the property and including that which was inherited by G. R. Jr., supposed to be deceased. The deed further provided that the grantors would, at any time thereafter, sign, execute and acknowledge any other or different paper which the grantee might find it necessary to sign in case it should afterward appear that G. R., Jr. was not then dead but died thereafter, so that the title which they then had, or might by his death, or otherwise acquire, might be fully conveyed to plaintiffs. There being no proof of the death of G. R., Jr. the attorney designated advised against the title.

It appeared that G. R., Jr. left home in 1863, being twenty-two years of age and unmarried; that his mother and brother never heard of him afterward, or what had become of him, and plaintiffs were unable to furnish any other

information concerning him; that he was not in good health and was dissipated; that at one time he was seen in Albany in a destitute condition in want of clothing, and said that he was going to Troy to procure work. Upon those facts specific performance was refused. Plaintiffs contended that the presumption of law was that G. R., Jr. died intestate and unmarried, and that his interest in the real estate passed to plaintiffs by the deed executed by his mother and brother, they being his heirs at law.

James Breck Perkins, for appls.

J. F. Yeoman, for resp't.

Held, That the title was not a marketable one and defendant was not bound to accept it. 86 N. Y., 575; 100 id., 1; 103 id., 565; 51 id., 21; 45 id., 234; 65 How., 75.

In order to be a marketable title it must be free from judicial doubt or uncertainty as to matters of fact, and one upon which possession may be acquired and retained without litigation or judicial decision. That if a reasonable doubt exists in reference to any facts upon which the title depends, or such a doubt exists that a court of law would not feel called upon to instruct a jury to find that the fact existed, or where the title depends upon a matter of fact not capable of satisfactory proof, a title is not marketable. Plaintiffs title depends in part upon the death of G. R., Jr., intestate, unmarried, and without issue. There is no proof of his death other than the presumption that

may arise from his absence for a period of twenty-five years without being heard from during that time.

The case is distinguishable from *McComb v. Wright*, 5 Johns. Ch., 262, where the person was absent upward of forty years, was twenty-two when he left home and had often threatened to commit suicide.

It is probable that G. R., Jr., is dead, but the fact has not been satisfactorily proven beyond a reasonable doubt.

Again, in order to be a marketable title it should be one that dealers in real estate, saving banks and trust companies would be willing to take or invest in. A purchaser would hesitate to advance the full consideration for a title that was liable to be defeated by the return of the true owner, and saving's banks, etc., would not make loans in any considerable amount under such circumstances. But, again, it appears to us that the contract calls for more than a marketable title, it calls for a first class title. First class means a clean record title, or at least one not depending upon presumptions that may be overcome, or facts that are uncertain.

Held also, That the common belief of the people of the locality from which the absentee departed, as to his death, or the general opinion of his family upon the subject, was inadmissible.

Judgment affirmed.

Opinion by *Haight, J.; Smith, P.J., Barker and Bradley, JJ.*, concur.

APPEAL. PRACTICE.

N. Y. COMMON PLEAS. GENERAL TERM.

Albert Crumiell, *applt.*, v. Robert Hill, *respt.*

Decided Feb. 6, 1888.

In an action for false imprisonment, the General Term has not authority on deciding that the amount of damages is excessive, to order judgment absolute for nominal damages only.

Appeal from judgment of General Term of the City Court, reducing verdict of \$50 to six cents damages and six cents costs, and directing that judgment be entered on such verdict as so reduced.

The action was for false imprisonment.

The question to be decided in this case was stated by the court, to be, "Had the General Term of the City Court power, when they decided the amount of damages found by the jury to be excessive, to order the reduction of the verdict to nominal damages, or was it their duty to have ordered a new trial?"

John C. Dennison, for *applt.*

Jeroloman & Arrowsmith, for *respt.*

Held, That since the decision of *Carsin v. Delaney*, 38 N. Y., 178, the former rule seems to have been changed, and in many cases of tort for injuries to persons, the General Term has on appeal from the order of Special Term entered on motions to set aside the verdict for excessive damages, made a conditional order reversing the judgment and granting a new trial, unless the plaintiff would

consent to reduce the damages to a specified sum, and affirming it for that amount if the plaintiff should consent to the reduction.

This practice seems to have been approved of by the Court of Appeals in later decisions. In *Whitehead v. Kennedy*, 69 N. Y., 462, the court says: "This seems to be a comparatively modern practice, and cases in this court have assumed that the General Term had the power on appeal in these cases, if the verdict is deemed excessive, to make the conditional order mentioned. We do not intend to disturb the authority of these decisions." But we know of no practice or authority which goes to the extent of allowing the appellate court to determine disputed questions of fact, and render final judgment upon such determination. To do this would not be within the appropriate functions of the appellate court, and would be an invasion of the province of the trial court.

Judgment reversed and new trial ordered, costs to abide event.

Opinion *per curiam*.

EXECUTORS. SET OFF.

N. Y. SUPREME COURT. GENERAL TERM. FIFTH DEPT.

John Alexander, *admr.*, v. Horace T. Durkee.

Decided Dec., 1887.

The surrogate directed the administrator to apply the moneys due from the estate to the defendant, upon his several notes held by the administrator. The administrator applied the amount upon one of the notes, which it satisfied, and then

recovered judgment upon the others. Assuming that the surrogate had no power to make such order or decree, yet, *Held*, That the administrator had a right to make such application, and having done so, the defendant was not entitled to have the moneys found due him by the decree of the surrogate applied in part payment of said judgment.

Appeal from order of Special Term applying the sum of \$199.47 upon plaintiff's judgment, in part payment thereof. Both parties appeal.

Defendant moved the court for an order that the sum of \$351.39, the amount found his due by the decree of the Surrogate's Court, in the hands of plaintiff, be applied in part payment of his judgment. The referee found as facts, that upon an accounting before the surrogate a decree was entered adjudging that there was in the hands of plaintiff, as administrator, the sum of \$351.39 belonging to this defendant, which the surrogate directed to be paid to him by applying the same upon his four notes held by the administrator; one for \$152 dated April 1, 1878; one for \$200 dated April 1, 1881; one for \$310.43 dated April 1, 1876; and one for \$191.87 dated Dec. 10, 1870; that plaintiff applied upon the first named note the amount of the principal and interest, paying it in full upon the other three notes he applied the interest due to July, 1885, and the balance of the \$351.39, to wit, \$29 be applied upon the last mentioned note. Suit was then brought upon the three notes remaining unpaid, upon which the judgment herein was entered for the balance

due after applying the \$351.39 as aforesaid. The referee further found, as a matter of law, that the surrogate had no power to direct the payment of the notes, and that therefore, the amount applied on the first named note (\$199.47) should be applied upon the judgment. The Special Term confirmed the report of the referee.

W. E. & F. E. Hughitt, for plff.

J. R. Cox, for deft.

HAIGHT, J.—The conclusion of the referee and of the Special Term is not in accordance with that which appears to us to be just and equitable. Conceding, for the purpose of argument, that the referee is correct in his conclusion that the Surrogate's Court had no power to adjudge that the amount found due Durkee should be applied in the payment of the notes held by the administrator. The fact exists, however, and is not controverted, that by the terms of the decree plaintiff, as administrator, owed Durkee \$351.39 and that the latter owed the former upon the notes held by him \$800; that plaintiff did in fact apply the whole amount of \$351.39 upon the notes in question, and that in the suit subsequently brought by him judgment was taken only for the balance actually due. The referee appears to have made a distinction between the amount applied upon the note first mentioned and that applied upon the other three notes, concluding that the amount applied upon the latter notes could not equitably be applied upon the judgment, as it would result in

double payment, etc. But is not the same true in reference to the first named note? This note was past due and was in plaintiff's hands, and he had a right to have it paid, and it was treated by him as paid in the action brought upon the other three notes. It appears to us that the equities in reference to this note are equally as strong as they are in respect to the payment applied upon the other notes; specially if it is true, as claimed, that defendant is insolvent and a non-resident. Defendant is in a court of equity asking for an equitable offset; no question is made in respect to his liability upon these notes or the amount thereof. Under the conceded and established fact he has had his pay in full and is without equitable claim.

Order reversed.

Smith, P.J., Barker and Bradley, JJ., concur.

NEGLIGENCE. DAMAGES.

N. Y. COMMON PLEAS. GENERAL TERM.

John Kelly, admr., *respt.*, v. The Twenty-Third Street R.R. Co., *applt.*

Decided Feb. 6, 1888.

The rule that where pecuniary damages are sought, evidence of their existence and extent must be given, is not applicable to the statutory action by an administrator for causing death of the decedent; nor is there any discrimination between immediate and collateral relatives as to the degree and nature of the proof required in such an action.

Appeal from judgment entered

on verdict of jury and from order refusing new trial.

Action to recover for pecuniary loss sustained by the next of kin of Peter Morris, who died intestate. He was killed, as claimed through the negligence of defendant. There was conflicting evidence, both as to the negligence of deceased and of defendant, and these questions were submitted to the jury. Peter Morris left no father, mother, widow, children, other persons dependent on him for support. His only next of kin were a sister and brother, living in Ireland, and three nephews in this city. He was by occupation a junk dealer. The testimony did not show he had ever done anything to support, or in any way assist any of these relatives while he lived, nor did it show what he earned, nor what, if anything, the value of his life was to his next of kin. Upon this state of facts, defendant moved to dismiss the complaint on the ground, among others, that there was no basis of damage, or for more than nominal damages, which motion was denied and defendant excepted.

L. W. Russell, for *applt.*

C. Stecker, for *respt.*

Held, That the rule that, where actual pecuniary damages are sought, some evidence must be given showing their existence and extent has never been applied to actions brought by an administrator, to recover for the pecuniary injury sustained by the next of kin from the death of a person caused by the negligence of an-

other. Nor have the courts of this State discriminated between the immediate and collateral kindred, and required more or different proof in the case of the latter than in the former; although this has been done in some other States, where it is held there must be some direct proof that the collateral kindred had been supported by the deceased, or that there was a probability of their receiving support from him had he lived. 75 Ill., 468; 93 id., 302; 25 O. St., 512; and in our opinion, such a discrimination might well be made.

Judgment affirmed, with cause.

Opinion *per curiam*.

LIMITATIONS.

N. Y. COMMON PLEAS. GENERAL TERM.

Horatio P. Allen, *applt.*, v. Henry Trisdorfer, *respt.*

Decided Feb. 6, 1888.

A letter written and sent by the debtor to his creditor, acknowledging the debt, and promising to pay the same "as soon as I possibly can," is sufficient under Code § 395, to take the claim out of the statute of limitations; this though the letter be sent prior to the expiration of the six years' limitation.

Appeal from judgment of City Court of New York, reversing judgment for plaintiff and ordering new trial.

The rent sued for was due April 1, 1879. The suit for its recovery was not commenced until Aug. 23, 1886. The statute of limitations was interposed as a defense, and the sole question to be decided is whether or not the fol-

lowing letter written and sent by defendant to plaintiff's agent, takes the case out of the operation of § 395, Code Civ. Pro.

"N. Y., March 3, 1881.

AUG. H. ALLEN, ESQR.,

320 Broadway.

DEAR SIR:—Yours of the 24th inst. came to hand, and in reply would say, that when I made you the promises, I honestly intended and still do intend to pay you amount due you, but I trust you will believe me, when I tell you, it was utterly impossible, up to this time to do so, and can only again say that *I will pay you as soon as I possibly can*. Of course if you wish to sue me, I cannot prevent you, as the claim is just, but I fail to see that you will be paid any sooner by that method, as I do not dispute your claim. Hoping you will have a little more patience, and that you may soon hear from me. I remain, yours truly, H. TRISDORFER.

Wager & Acker, for *applt.*

Allen, Talmage & Allen, for *respt.*

Held, That the letter in question explicitly shows an unqualified acknowledgment in writing of the existing debt as well as unconditional promise to pay the same. It has the same effect as if defendant on March 3, 1881, had given his note of hand to pay the debt.

The fact that the acknowledgment and promise was made prior to the expiration of the six years limitation of the statute cannot destroy the legal effect of such acknowledgment and promise.

The letter of March 3, 1881, added nothing and could not have increased the liability of defendant then existing. Its evident intention was to secure to plaintiff the ultimate recovery of his debt.

Judgment of General Term reversed, with costs, and that of Special Term affirmed, and judgment absolute for defendant ordered on stipulation.

Opinion *per curiam*.

HUSBAND AND WIFE. SEPARATION.

N. Y. COURT OF APPEALS.

Pettit, *respt.*, v. Pettit, *applt.*

Decided Dec. 20, 1887.

An agreement between husband and wife providing that upon the payment by the former to the latter of a certain sum, which should be received by her in lieu of all her dower right, etc., in his property, they should thenceforward live apart is not void as against public policy when at the time of making such agreement, the parties were living separate and apart and an action for separation upon the ground of cruel and inhuman treatment was pending between them.

Affirming S. C., 22 W. Dig., 364.

Plaintiff and defendant are husband and wife and at the ages of eighty and seventy-three. The wife brings this action for a limited divorce upon the ground of cruel and inhuman treatment. Pending the trial a settlement was agreed upon to enforce which this action was brought. Said settlement provided that the real and personal property of the husband should be sold and converted into money, and after paying his debts to an amount not exceeding \$600

one-third of the balance remaining should be paid over to the wife, and the parties should live separate. The property was advertised for sale as agreed, but before the sale defendant, through his counsel demanded the execution by plaintiff of an agreement to be executed also by two of the sons, expressly indemnifying defendant against any liability for the support of the wife already incurred, or that might thereafter accrue. The wife refused to sign unless the sons did and they declined. The husband indicated a purpose not to carry out his agreement unless the proposed indemnity was executed. The sale took place and the land was purchased by one S., for \$5,160. The personal property brought \$541. A contract of sale by the husband and wife was executed to S., but when the day for delivering the deed arrived the wife refused to sign, except upon receiving her share of the money upon the spot. S. brought a suit to compel a delivery of his deed. Pending that the new differences were settled, by a supplemental agreement that the wife should sign the deed and the husband deposit \$1,400 to abide the event of the present action. The costs in the suit brought by S. seemed to have been arranged by an agreement with the wife's attorney to pay them out of any costs recovered by the wife in this action. The deed was signed and the money deposited. The complaint herein sets out the original written agreement, alleges full performance on the part

of the wife, and demands performance by the husband to the extent of the one-third of the net proceeds. Defendant claimed that he signed the agreement under a mistake of fact produced by the concealment of a material fact on the part of the plaintiff. He averred that he did not know of any claim against him for the previous support of his wife; that two of his sons had such a claim to the amount of \$1,000 and his wife knew it; that when the agreement was being made he was asked what debts he owed and answered \$600, and that amount was named in the agreement, the wife and sons concealing the fact of the existing claim for support. There was no proof that at the date of the agreement the sons had any such claim in fact, or were conscious of such a right, or that the wife knew it if any existed. Defendant did not even establish that such a claim had been made upon him subsequent to the agreement.

Josiah T. Mareau, for applt.

G. Storms Carpenter, for resp't.

Held, That the defense, not having been proved was unavailable.

It was claimed that the agreement, between husband and wife was against public policy because by its terms, the wife agreed to live separate and apart from her husband.

Held, Untenable; that public policy did not turn on the question whether the husband defended the suit for divorce to final judgment; that the plaintiff therein would have been entitled,

if successful, to a decree of separation and to a suitable allowance from the estate of her husband for support and maintenance.

Where the separation exists as a fact and is not produced or occasioned by the contract, the consideration of the husband's agreement to pay is his release from liability for the support of his wife. 22 Barb., 97; 38 Hun, 27; 102 N. Y., 552.

Judgment of General Term, affirming judgment for plaintiff, affirmed.

Opinion by *Finch, J.* All concur.

RAILROADS. INJUNCTION. PARTIES.

N. Y. COURT OF APPEALS.

Moore et al., comrs. of highways, appls., v. The Brooklyn City RR. Co., resp't.

Decided Jan. 17, 1888.

Commissioners of highways have no legal capacity as such to maintain an action to restrain a railroad from changing its terminus.

The threatened violation of a mere naked, legal right, unaccompanied by special circumstances, is not a ground for injunction when legal remedies are adequate to redress any resulting injury.

This action was brought by plaintiffs as commissioners of highways of the town of New Utrecht to compel the defendant to maintain the terminus of its road at the intersection of Fort Hamilton avenue and the Shore Road as fixed by the consents given in 1861 to defendant for the construction and operation of its

road and to prevent it from changing from that point to a point on the Shore road about 600 feet from the intersection of said streets. Plaintiffs claimed to represent the interests of the public. The court found that the proposed change of terminus was demanded by public convenience and safety. The proposed change will involve the abandonment of about 1000 feet of the road.

William Sullivan, for appls.

Thomas E. Pearsall, for respt.

Held, That plaintiffs as highway commissioners have no legal capacity to maintain this action, Laws of 1855, Chap. 255, 25 Wend., 364; 1 Den., 510; 24 N. Y., 261.

Plaintiffs claimed that they were entitled to maintain this action on the ground that defendant

is under a legal obligation to maintain and operate its road over the entire route specified in the consents of 1861, and to the precise terminus therein mentioned.

Held, That such an action could hardly be maintained even if the public interests require it. 24 N. Y., 261; 11 id., 376.

The threatened violation of a mere naked, legal right, unaccompanied by special circumstances is not a ground for injunction, when, as in this case, legal remedies are adequate to redress any resulting injury. 90 N. Y., 58; 2 Story's Eq., § 927 C.

Judgment of General Term, affirming judgment dismissing complaint, affirmed.

Opinion by *Andrews, J.* All concur.

INDEX.

ADJOINING OWNERS.

1. In an action to restrain the discharge of surface waters through an artificial ditch it was claimed that defendant had cut through a natural ridge of ground that prevented the water from flowing that way. The court found that the waters had long flowed that way; that the drain slightly increased the natural flow, but did no substantial damage to plaintiff, and refused to find that any ridge had been cut through or any new drainage area added to the natural flow. *Held*, That the action could not be maintained. —*Jeffers et al. v. Jeffers*, 446.

See FENCES.

ADMINISTRATORS.

See EXECUTORS.

ADVERSE POSSESSION.

1. Evidence insufficient to show title by adverse possession. —*Elwood et al. v. Northrup*, 76.
2. To constitute an adverse title under 2 R. S., Chap. 1, Tit. 2, Art. 4. § 147, there must be some specific title, whether good or bad, under which the adverse claim is made, and there is no such color of title when possession was taken purely by mistake as to the boundaries of a deed. —*Dansiger v. Boyd et al.*, 479.

See ESTOPPEL, 1.

AGENCY.

1. Plaintiff was employed as an agent by defendant, which employment was renewed by an agreement in writing by which the company also agreed to give him regular renewal commissions on policies obtained by him when the premiums were paid. *Held*, That this entitled him to renewal commissions on policies obtained by him during the year, and that a subsequent abrogation of the contract before the close of the year did not deprive him of the right to receive such re-

newal commissions. —*Hale v. The Brooklyn Fire Ins. Co.*, 815.

2. Defendant formed a copartnership for carrying on the milling and flour business and leased of the wife of E., one of the copartners, her grist mill. Plaintiff supplied to E. shafting, etc., to be used in the mill, and charged the same to him, without being aware of the copartnership. *Held*, That it was competent for defendants to show that it was understood or agreed between E.'s wife and the firm that she should change the grist mill into a roller roll and put in the necessary machinery, etc., and make the needed repairs, in order to put the mill into running order, and that in ordering the machinery from plaintiff he was acting as her agent and not as a copartner. —*Jones v. Eaton et al.*, 556.
3. Where defendant and his father lived on a farm which was owned by the former, and defendant purchased goods from time to time upon credit of plaintiffs, a portion of which were purchased by the father and hired man, and defendant had made payments of money and produce on the same, and the transactions between plaintiffs and defendant took the form of an account on the books of plaintiffs, and subsequently defendant leased the farm stock and utensils to his father and moved from the farm, and his father conducted the business of the farm in apparently the same manner as formerly, and continued to purchase goods of the same general character of plaintiffs, who without notice of the change of the relations between the father and the son in respect to the business of the farm charged such goods so purchased to defendant in his account, *Held*, That defendant by reason of want of notice of revocation of agency was liable to plaintiffs for goods so furnished his father; that knowledge that defendant had moved away from the farm did not necessarily require the conclusion that plaintiffs had notice of the change of relations. —*Riggs et al. v. Warner*, 488.
4. Statements made by defendant's father when plaintiffs were figuring up the ac-

count, and drawing up a note for the father to procure his son's signature to, are competent as a part of the *res gestæ*.—*Id.*

5. One who is sent by foreign principals to found and carry on a branch of their business in this country without special instructions and without a power of attorney, and who carries on business in his own name, is not authorized to borrow money for his principals.—*Bickford v. Menier et al.*, 548.

6. A power in an agent to borrow money on behalf of his principals must be practically indispensable to the execution of the duties really delegated in order to justify its inference from the employment.—*Id.*

See MECHANIC'S LIEN, 2; PLEADING, 6, 7.

AGRICULTURAL SOCIETIES.

1. Chapter 181, Laws of 1871, empowers life members of the State Agricultural Society to vote by proxy at all elections of officers. At the annual meeting in 1887 the society passed a resolution "that no proxy should be voted on at any meeting unless showing within itself that it was specifically intended to be used at such meeting." *Held*, That the resolution was repugnant to the statute and void. Although a proxy was in blank and was filled out immediately before the election it is, in the absence of any challenge by the maker of the power of attorney, good and must be counted.—*In re petition of White et al.*, 341.

ALIMONY.

See HABEAS CORPUS.

AMENDMENTS.

See APPEAL, 10; EMINENT DOMAIN, 6; LARCENY, 4; PLEADING, 4; RAILROADS, 2; WILLS, 25.

ANIMALS.

1. One who harbors a dog with knowledge that it has attacked a human being is responsible for all subsequent injuries inflicted by the animal. The question of actual ownership is immaterial.—*Keenan v. The Gutta Percha & R. Mfg. Co.*, 438.
2. Notice to an agent of a corporation of such fact is notice to the corporation.—*Id.*

See EVIDENCE, 16.

ANNUITIES.

1. Where no date or period is fixed for the

payment of an annuity it may be apportioned, and where the annuitant dies before the expiration of the year his personal representative is entitled to a proportionate part of said annuity.—*Reed v. Cruikshank*, 287.

See WILLS, 7.

APPEAL.

1. An application for leave to amend the statement of a confession of judgment is addressed to the discretion of the Supreme Court, and upon appeal from the order thereon the Court of Appeals cannot add other conditions to those imposed by the court below.—*Symson v. Selheimer*, 11.

2. A condition postponing the lien of the judgment to those existing at a certain date does not postpone as to a judgment docketed in form, but which is as matter of law void.—*Id.*

3. The papers on a motion for reargument should be sufficient to enable the court to determine whether its decision requires correction in any respect.—*Anderson v. The Continental Ins. Co.*, 117.

4. Where an appeal from Justice's Court has been regularly taken and perfected the County Court has jurisdiction of the same, although the notice demands a new trial to which appellant is not entitled.—*Dudley v. Brinkerhoff*, 140.

5. D. conveyed certain property through a third person to his wife, who executed a mortgage to one M. and one to C., who assigned it to D. as administrator of one A. The first mortgage being foreclosed left a surplus, but not sufficient for payment of the second. On appeal from an order on distribution thereof, *Held*, That the conveyances and mortgage being valid as between the parties thereto, in case the order could be reversed the surplus would belong to D. as administrator, and the other parties not being aggrieved could not appeal.—*Hyatt v. Dusenbury et al.*, 160.

6. Where there are no errors pointed out by the exceptions and the order of General Term does not state that the reversal was on the facts, such order of reversal cannot be upheld.—*Prosser v. The First Nat. Bk. of Buffalo et al.*, 229.

7. An appeal from an order, made on additional papers, vacating an order made by another judge, the first order is not under review, and the judge who made it may properly sit on the hearing of such appeal.—*Phillips v. The Germania Mills*, 243.

8. Whether on all the papers before it there

were sufficient facts to justify the examination of an officer of the defendant before trial rests in the discretion of the General Term and an appeal will not lie from its determination.—*Id.*

9. An appeal will not lie to the Court of Appeals from a judgment of General Term modifying in other respects an interlocutory judgment ordering an account.—*King et al. v. Barnes et al.*, 293.
10. The granting of amendments to the complaint not substantially changing the claim rests in the discretion of the court, and an order of General Term allowing them is not appealable to the Court of Appeal.—*Id.*
11. So also as to a stay pending an appeal.—*Id.*
12. Where, on motion in County Court for leave to issue execution on a judgment recovered in Justice's Court and transcript filed, a claim was made that plaintiff was not the owner of the judgment but had assigned it, and the alleged assignee was allowed to present proofs of said assignment. *Held*, That it was substantially a special proceeding and that an appeal would lie from the order of the County Court under § 1857.—*The Ithaca Agricultural Works v. Eggleston*, 343.
13. The General Term cannot base a reversal on facts neither proved before nor found by the trial court and of which it could have no legal information.—*Day v. The Town of New Lots*, 349.
14. The twenty days after entry of a judgment rendered in the Municipal Court of Rochester expired on Sunday. *Held*, That notice of appeal served on the following Monday was timely.—*Dorsey v. Pike*, 332.
15. Where the General Term reverses an order denying motion for a new trial on the minutes and grants a new trial, it will be assumed that its order was based on one of the grounds mentioned in § 999, and where the case presents disputed questions of fact it cannot be said that the reversal was not on a question of fact, and an appeal from such order to the Court of Appeals brings up nothing to review.—*Pharis v. Gere*, 399.
16. A party against whom judgment has been rendered is not prevented from appealing to the Court of Appeals by the fact that he has paid the judgment unless the payment was made by way of compromise or with an agreement not to appeal.—*Hays v. Nourse*, 497.
17. A justice of the Supreme Court is not a party aggrieved, nor does he represent those who may be aggrieved so as to en-

title him to appeal from an order of General Term reversing his order and discharging a prisoner.—*The People ex rel. Breslin v. Lawrence*, 546.

18. To entitle the appellant to have the questions of fact reviewed by the Appellate Court the case must contain a statement that it contains all the evidence given on the trial.—*Porter et al. v. Smith et al.*, 549.
19. In an action for false imprisonment, the General Term has not authority on deciding that the amount of damages is excessive to order judgment absolute for nominal damages only.—*Crumieff v. Hill*, 570.

See DEPOSITIONS, 1, 4; GUARDIANS, 5; JUDGMENT, 2; REFERENCE, 6; WILLS, 6, 27.

ARREST.

1. An undertaking on arrest does not comply with the statute requiring two sureties where it is signed by one of the plaintiffs and one surety.—*Perry et al. v. Smith*, 139.
 2. An affidavit to obtain an order of arrest should contain the evidence from which the court can draw conclusions, and not the conclusion of the affiant drawn from evidence which is not furnished to the court.—*Id.*
- See EXECUTION, 2-5.

ASSAULT.

1. A conviction of assault in the first degree in administering poison cannot be sustained where the evidence is not sufficient to show that the life of the person to whom it was administered was endangered.—*The People v. Burgess*, 114.

ASSESSMENTS.

1. The mere setting aside of a sale for unpaid assessments under Chap. 312, Laws of 1874, does not affect the assessments themselves.—*Daly v. Sanders*, 145.
2. The Prohibition against actions to vacate assessments in the city of New York contained in Chap. 338, Laws of 1858, as amended by Chap. 302, Laws of 1874, applies only to assessments which are liens at the time the action is commenced, and an action will lie after payment of an assessment to declare the same invalid and to recover back the sum paid.—*De Montsaunlin v. The Mayor, etc., of N. Y.*, 239.
3. Money voluntarily paid by a widow out of her own personal funds to discharge the lien of a valid assessment upon property in which she claims dower, no proceedings having been taken to collect the

assessment, cannot be recovered back.—*Vanderbeck v. The City of Rochester*, 397.

4. Lands were assessed for benefits supposed to be derived from opening a proposed boulevard. The assessments were collected and the moneys applied toward payment of the awards made for lands taken, but nothing had been done toward opening or working the boulevard although six years had elapsed. Under the city charter it required a majority petition of the landowners, or a three-fourths vote of the council, in order to open and work a street; but no petition had ever been presented, and no action had been taken by the council. *Held*, That a person who had been assessed for benefits could not recover back his money upon the ground that the proceedings had been abandoned.—*Id.*
5. Chapter 311, Laws 1861, relative to opening and working highways within six years, etc., is not applicable to streets laid out within the cities of the State.—*Id.*

ASSIGNMENT FOR CREDITORS.

1. In an action to compel an assignee to account, brought by a creditor in behalf of himself and other creditors, where a creditor appears and files his claim he becomes a party to the action and is entitled to notice of all subsequent proceedings.—*Bradley et al. v. Chamberlain*, 94.
2. An assignment for creditors in the form of an indenture between the assignor and assignee, signed by both, contains a sufficient assent by the assignee and is valid without a separate assent by him.—*Scott v. Mills*, 142.
3. Advertising for presentation of claims under an order of the Court of Common Pleas by the assignee is not a proceeding for an accounting and does not deprive the Supreme Court of jurisdiction of an action to compel an accounting.—*Ludeke et al. v. McKeever*, 184.
4. Upon an accounting by an assignee under the General Assignment Act, Chap. 438 of 1877, a creditor may show that the assignee was negligent in failing to reduce to possession assets which had been fraudulently transferred by the assignor before the assignment; and, in case of a plain violation of duty, the assignee may be charged with the amount, and this although the fraudulent holders of such assets are not and cannot be parties to the proceeding.—*In re assignment of Carpenter*, 253.
5. The question of neglect, however, is one to be decided by the circumstances of each case, regard being had to how the matter might have seemed to the assignee at the time and not as it might have been made to appear after long investigation; regard being had also to the question whether there was a prospect of a beneficial recovery.—*Id.*
6. The general creditors of a mortgagor of chattels have no right to assail a mortgage made by him as invalid until they have secured a lien thereon by levy under execution or by some other method acquired a legal or equitable interest in the property.—*Sullivan et al. v. Miller et al.*, 295.
7. A mortgagor of chattels has an assignable interest in the property which passes, subject to payment of liens, to his assignee for creditors.—*Id.*
8. After waiting a reasonable time for claimants to establish their rights to the property it is the duty of the assignee or the receiver appointed in his place to take the direction of the court as to its disposition, and he is under no obligation to give notice to the general creditors of his application for such direction.—*Id.*
9. A former employee of an insolvent who has assigned for the benefit of creditors under Chap. 466, Laws of 1877, is entitled to a preference in payment as provided by Chap. 283, Laws of 1886, in case his wages remain in fact unpaid at the time of the assignment, and although the employee has taken the assignor's note due at a future day to secure payment of his wages.—*In re settlement of Heath*, 406.
10. In an action to set aside an assignment made for the benefit of creditors, upon the ground of fraud, *Held*, That as there was sufficient evidence in the case to sustain the findings of the trial court, that no fictitious claims had been fraudulently inserted in the assignment, nor any money or assets intentionally or fraudulently withheld by the assignor, this court could not say, notwithstanding circumstances of suspicion existed, that the findings were so clearly against the weight of evidence as to warrant a reversal of the judgment.—*Sloan et al. v. Gauhn et al.*, 558.

See CHATTEL MORTGAGE, 5; CONTRACT, 2; FIRE INSURANCE, 6; WILLS, 23.

ATTACHMENT.

1. An affidavit by an agent simply stating on information and belief that a cause of action exists and that a certain sum is due over all counterclaims known to plaintiff and that affiant's knowledge and belief are correspondence with plaintiff is insufficient to support an attachment.—*Hingston v. Miranda*, 68.

2. Defendant was a corporation doing business in Illinois. An English insurance company being indebted to it for a loss on property in Chicago on a policy issued there, plaintiffs procured an attachment which was served on the New York agent of the insurance company. *Held*, That the indebtedness could not be attached. —*Straus et al. v. The Chicago Glycerine Co.*, 247.

3. An attachment cannot issue in an action upon a judgment unless it affirmatively appears that the judgment is upon contract, and even then it is doubtful whether it can issue where the judgment is the sole foundation of the indebtedness. —*The Gutta Percha & R. Mfg. Co. v. The Mayor, etc., of Houston*, 271.

See PARTNERSHIP, 7-9; RESTITUTION.

ATTORNEYS.

1. In the absence of an agreement, the compensation of an attorney is not in all cases co-extensive with the taxable costs; in an ordinary case or a small number of cases the taxable costs might furnish a fair compensation, but for services in an enormous number of cases involving no complicated questions of law and only the most simple question of fact an allowance of taxable costs in each case would be grossly excessive. —*Starin v. The Mayor, etc., of N. Y.*, 42.

2. An attorney's will contained a clause releasing all claims he might have against any person named in the will. By his codicil he gave to defendant certain books and papers relating to a suit on which he had a lien for services. Defendant was not named in the will, nor released by the codicil. *Held*, The naked surrender of his lien on defendant's books showed a purpose to retain the debt and that defendant was not released therefrom. —*Sloane v. Stevens*, 450.

See EXECUTION, 8; JUSTICE'S COURT; RESTITUTION.

AUCTIONEER.

See SURETYSHIP, 2.

BAILMENT.

1. The general liability of a shopkeeper for the loss of a garment removed by an intending purchaser while in said shop, for the purpose of trying on another garment there for sale, is to be measured by the law of bailments. —*Bunnell v. Stern et al.*, 477.

2. Where it appears that such garment was by the owner laid on a counter intended for sale and exhibition of goods only, and

was in no way put in charge of defendants or their employees, and was lost, there being no proof of negligence or wrong on defendant's part, the shopkeeper is not liable. —*Id.*

See CONVERSION, 6, 7; NEGLIGENCE, 8.

BANKRUPTCY.

1. The State Courts have jurisdiction of an action against an assignee in bankruptcy to recover a dividend declared by the court, but retained and not paid over by the assignee. —*Berford v. Barnes*, 209.

2. In such an action the defendant may be named both individually and in his official capacity. —*Id.*

See JUDGMENT, 1, 8, 4.

BANKS.

1. Plaintiff certified a draft presented by the City Bank, which was retained by said bank in pursuance of a custom in the city by which the bank presenting such paper should hold it as an item of credit in the exchange account with the certifying bank. On that day the balance of account was in plaintiff's favor, which was to be settled the following day. The City Bank transferred the draft to defendant as a payment on its balance due that day. *Held*, That defendant was not a bona fide holder. —*The Flour City Nat. Bk. v. The Traders' Nat. Bk.*, 20.

2. A court of equity has jurisdiction of an action to compel the directors of a bank to account for the performance of their duties where it is alleged that by their negligence and misconduct losses have been incurred by which the bank is rendered insolvent, although issues may be framed to be tried by a jury. —*Brinckerhoff et al. v. Bostwick et al.*, 108.

3. Where the bank certifies a check drawn to the maker or order while still in his possession, such certification operates as a promise to pay it on presentation bearing the drawer's indorsement, and the bank cannot be made liable to a third party thereon by a transfer of the check without such indorsement. —*Lynch v. The First Nat. Bk.*, 328.

See CONTRACT, 16, 17; FRAUD, 2-5; LARCENY, 9, 10.

BAR.

1. The judgment debtor brought an action to redeem certain premises and filed a *lis pendens*. Defendant set up an absolute title. Subsequently plaintiff was appointed receiver in supplementary proceedings and brought this action to recover possession of said premises. The

former action resulted in a judgment in favor of defendant. *Held*, That plaintiff was bound by all the proceedings in the former action and that the judgment in that action was a bar to the maintenance of this action to recover possession.—*Spencer v. Berdell*, 221.

2. Before a finding in a former action can be invoked against a party as a prior adjudication it must appear that it constituted a decision or basis of a decision from which such party could have appealed.—*Cauhape v. Park et al.*, 288.
3. Where in a former action between these parties the referee found that the contract in question was made, but that the court had no jurisdiction thereof, and therefore dismissed the case as to such contract, *Held*, That the existence of the contract was not *res adjudicata* so as to bind the defendant.—*Id.*

See CHARTER PARTY, 3; CONVERSION, 6; JUDGMENT, 10

BASTARDY.

1. The mother of an alleged bastard testified that she was a married woman, but had not seen her husband in eight years, and never heard of his having died. *Held*, That a mother of a bastard is not competent to establish the fact of non-access of her husband for the period of one year prior to its birth.—*The People ex rel. Wright v. Supt. of Poor*, 35.

BILL OF PARTICULARS.

1. In an action by a judgment creditor to set aside a release given by the debtor to the defendant, the latter set up in his answer that the debtor was indebted to him in a certain sum on account of money advanced, and that the release was given in consideration and in satisfaction of such indebtedness. *Held*, That a bill of particulars was properly ordered, notwithstanding this allegation was unnecessary to be inserted in the answer, and the facts might be proven under a general denial.—*Weiler v. Mooney*, 79.
2. A copy account authorized by § 531 should contain both the debits and credits.—*The Union Hardware Co. v. Flagler et al.*, 116.
3. In an action by the proposed purchaser of real property to recover the amount of the deposit made by him, and expenses of examining title, etc., on the ground that the seller could not give good title, a bill of particulars may be ordered of the specific defects claimed in the complaint to exist in the title.—*Lahey v. Kortright et al.*, 394.

See SLANDER, 4.

BONA FIDE PURCHASER.

1. The character of *bona fide* purchaser must be completed before his title will have protection as against outstanding equities, and his performance or payments upon the contract of purchase, subsequent to the time he becomes affected by notice of them, will be treated as in his own wrong and not as available against such equities for any purpose; but so far as performance is made in good faith, and no further, he may have protection or indemnity for reimbursement, and for that purpose a lien for the amount so paid.—*Sargent v. The Eureka Spund Apparatus Co.*, 208.

See BANKS, 1; CONVERSION, 1; FRAUD, 1.

BOUNTIES.

1. The power conferred on boards of supervisors to borrow money on the credit of the county to pay bounties was not exhausted when once exercised, but the boards had power to borrow and renew their obligations from time to time to continue the indebtedness so created. In an action on a note given by the treasurer under authority of the board for such purpose the burden is on the county to show that the note in question was outside of and in excess of the actual authority of the treasurer.—*Parker et al. v. Suprs. of Saratoga Co.*, 171.
2. Authority to the treasurer to borrow money to extend a debt already existing, such as bonds and notes of the county, is not a delegation of the judicial powers of the board.—*Id.*

BRIBERY.

1. On the trial of an indictment for bribery the testimony of defendant given before a committee of the senate appointed to investigate the facts involved in the charges of bribery, defendant being under subpoena, is inadmissible against him. It is not necessary for the protection of defendant under § 79, Penal Code, that defendant should have refused to obey the subpoena or to answer the questions of the committee, the subpoena being compulsory.—*The People v. Sharp*, 878.
2. Evidence that a year before the offense charged defendant tried to bribe another person is not admissible on the question of intent with which defendant paid the bribe alleged, it being too remote and proof of the commission of one crime is not admissible on the trial for another offense.—*Id.*
3. Evidence that some of the persons alleged to have been bribed and who were

co-defendants were in Canada is inadmissible and irrelevant, the rule that a failure to produce proof which would render material but doubtful facts certain will raise a presumption against the party who omits to do so does not apply unless it appears that such proof is in his power.—*Id.*

BROKERS.

1. Defendant, who was president of a corporation employed plaintiff to procure a contract for the sale of goods the corporation was to manufacture. Plaintiff procured a customer and submitted to defendant a contract to get signed. *Held*, That he was entitled to his commissions and that it was not necessary to entitle him to them that the corporation was willing to manufacture the goods or that defendant had so represented.—*Fitch v. Cunningham*, 198.

See DEPOSITIONS, 6, 7.

CANALS.

1. Where the property appropriated by the State was not the property of plaintiff, but plaintiff's property was affected by such appropriation, plaintiff's remedy must be had by presenting and asserting his claim against the State in the manner which is permitted by the statute, and he cannot maintain an action for damages resulting from such appropriation against the officers of the State or those legally acting under their authority.—*Wright v. Eldred*, 249.
2. The superintendent of the Auburn water works company is not within the class of persons excluded from appointment upon the canals as provided in 1 R. S., 250, § 185, as it appears that the right of the water works company was not adverse to those of the State, and the water taken by them was in no sense taken from the canals, under the appropriation of water made by the State.—*Id.*
3. The letter of authority under which defendant acted, by which he was authorized or requested "to close flush gates when the water was lowered sufficiently, and to open them temporarily when it should become necessary," does not come within the rule which does not permit a person charged with an official duty or authority involving the exercise of discretion or judgment, or with an agency of personal trust and confidence, to delegate it to another as applied to the case at bar.—*Id.*

CERTIORARI.

1. Upon the return of a writ of *certiorari* the court may examine the evidence and

determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the rights of the parties has been violated.—*The People ex rel. Wright v. Supt. of Poor*, 85.

2. But the proceedings will not be annulled by reason of errors in the admission or rejection of evidence only, provided no rule of law affecting the rights of the parties has been violated to the prejudice of the relator, and where there is any competent proof of all the facts necessary to be proved in order to authorize the determination.—*Id.*
3. Where the return is silent as to the allegations of the petition the case must be heard both on the petition and return, and the allegations of the petition must be taken as true.—*The People ex rel. McLoughlin v. Fire Comrs.*, 134.

See HIGHWAYS, 8; TAXES, 8.

CHARTER PARTY.

1. By the terms of a charter party a portion of the freight was to be paid at Cadiz in cash. Upon arriving there the master of the vessel, although knowing that the charterer's agent at that place had sufficient moneys of theirs in his hands with which to pay the freight, for convenience in remitting the same to the owners allowed such agent to undertake to procure a draft for him and forward the same to them, and relied upon the statement of such agent that he had done so without investigation. Such agent did not procure a good draft, but drew an unauthorized draft on the charterers, having at that time no money in their hands, and such draft when presented was dishonored. *Held*, That the master was entitled to recover the freight for which the draft was taken; that there was no payment of the debt.—*Holdsworth v. De Belaunzaran et al.*, 26.
2. A charter party was executed by defendants with their firm name but in fact for themselves and the other charterers, which fact was not known to plaintiffs. The charter party was not under seal. *Held*, That plaintiffs could prove in an action on the charter party that defendants executed it as representing all the charterers; and that such other persons could be treated as dormant partners and were not necessary parties defendant.—*Woodhouse et al. v. Duncan et al.*, 230.
3. An adjudication in a former suit in admiralty against plaintiffs brought by defendants in which it was adjudged that plaintiffs had performed all the covenants in the charter party is binding on the

parties thereto and those whom they represented and who were in privity with them.—*Id.*

CHATTEL MORTGAGE.

1. The provisions of an agreement are entitled to a reasonable interpretation, and to that end reference may be had to the purpose in view, to ascertain the intention of the parties.—*Burns v. Munger*, 28.
2. Where the purpose in view in an agreement for the sale of a canal boat which had been incumbered by chattel mortgages, is that the vendor vest the vendee with perfect title to it clear of incumbrance, it could not have been contemplated that any entry be made in the books of the auditor not authorized by statute, and all liens and mortgages are nullified when a perfect title is transferred, and when that is effectually done, the caprice of the vendee cannot properly take the place of satisfaction on his part.—*Id.*
3. When a chattel mortgage which is a first lien on personal property is foreclosed by sale of the mortgaged property, such foreclosure cuts off as effectually the lien of junior mortgages as a formal discharge of such mortgages by the mortgagees; and in either case there would be no change of the apparent situation on the records of the auditor's office, but the fact of satisfaction would have to appear *aliunde* the record.—*Id.*
4. Plaintiffs received from one F. in Pennsylvania an instrument in form of a bill of sale on a canal boat then in this State, but which was in fact a chattel mortgage; their agent immediately started to take possession of the boat, but arrived an hour after defendant had levied thereon under an attachment against F. The agent filed the mortgage and assumed possession until the sale by defendant. *Held*, Neither under the statutes relating to chattel mortgages nor the act relating to liens on canal boats were plaintiffs entitled to recover, and that the statutes of this State govern the case.—*Keller et al. v. Paine*, 299.
5. An assignee for benefit of creditors of the mortgagor cannot take advantage of the omission of a chattel mortgagee of the assignor to file his mortgage as required by the statute nor claim that the same should for that reason be set aside in a suit prosecuted by him for that purpose under the Act of 1858, Chap. 3-4. Nor can a judgment creditor of the assignor whose judgment was recovered after the assignment maintain an action to set aside the chattel mortgage upon the ground that the same or a true copy of it was not filed as required by the statute.—*Dorothy et al. v. Servis et al.*, 564.

See ASSIGNMENT FOR CREDITORS, 6, 7.

CIVIL DAMAGE ACT.

1. Evidence sufficient to require the submission of an action under the Civil Damage Act to the jury.—*Ackerman v. Betz*, 407.

CODE CIVIL PROCEDURE.

See APPEAL, 12; COSTS, 3, 5; DEPOSITIONS, 1; DURESS, 2; EVIDENCE, 8, 20, 24; EXECUTION, 1, 7; EXECUTORS, 5; INJUNCTION, 4; JUDGMENT, 4, 10; LEASE, 6; LIMITATION, 2, 8; MORTGAGE, 10; NEGOTIABLE PAPER, 8; PLEADING, 8; REVIVOR; SERVICE; WILLS, 5, 6.

CODE CRIMINAL PROCEDURE.

See CRIMINAL LAW, 6; LARCENY, 5.

COMMON CARRIERS.

1. B., who was vice-president of both defendant companies, whose routes connected, contracted with plaintiffs for the transportation of certain oil from Panama to New York for a single price. Two months after delivery of the oil bills of lading were sent to plaintiffs limiting the liability of each company to its own line. *Held*, That the contract was a joint one, which defendants had power to make, and that in the absence of proof that plaintiffs agreed to accept the bills of lading in place of the contract the latter was not altered or abrogated thereby.—*Swift et al. v. The Pacific Mail S.S. Co. et al.*, 99.
2. It is the duty of a carrier to ascertain whether a bill of lading was delivered to the shipper, and if so he should retain the property until demanded by one claiming under that title.—*Furman v. The Union Pacific R.R. Co.*, 182.
3. Plaintiff shipped goods marked "Y. Order notify Z. Bros.," and took bill of lading for same. Defendant received the goods and forwarded them in course of transit without notice of the contents of the bill of lading except a transfer sheet stating the consignee to be "Y. Order Hup, Z. Bros." Defendant delivered the goods on order of Z. Bros. without production of the bill of lading. *Held*, That it was liable for conversion; that the word "notify" was a plain notice that Z. Bros. were not the consignees, and as no one was named in the bill of lading no delivery should have been made to any one who did not produce it.—*Id.*
4. A common carrier is not only liable while the property is in course of transit, but continues liable for such a reasonable period of time as will enable the consignee after notice to effect the removal of the goods with reasonable diligence.—

Dunham et al. v. The B. & A. RR. Co., 325.

COMPOSITION.

1. While a secret agreement with one of several creditors as an inducement to procure his signature to a composition agreement that he shall receive a greater amount for the notes than their face is fraudulent and void, and will avoid the composition as to all innocent parties thereto, the party with whom such agreement is made cannot be heard to allege that the composition is invalid or be allowed to recover such increased amount, but he is to be held to his remedy on the composition notes.—*White v. Kuntz et al.*, 487.

CONSTITUTIONAL LAW.

See DAIRY LAW, 2; LARCENY, 5; N. Y. CITY, 2; RAILROADS, 7, 13, 16; TAXES, 8; TITLE, 8.

CONTEMPT.

See HABEAS CORPUS.

CONTRACT.

1. Where a building contract contains a provision that no extra work will be done unless agreed to by the superintendent, the price reduced to writing and signed, it is not error, in an action thereon, to exclude proof of extra work and materials where there does not appear to have been a compliance with the condition aforesaid.—*Sutherland et al. v. Morris*, 4.
2. Where an assignee for creditors adopts a contract of the assignor and undertakes its performance, but thereafter fails and refuses to carry it out, a counterclaim for breach of the contract may be allowed in an action by the assignee for goods furnished under the contract.—*Patton v. The Royal Baking Powder Co.*, 15.
3. Where the provision of a building contract requiring the work to be completed within a specified time has been waived by the owner he is not entitled to recover damages by reason of the non-completion of the building within the time specified.—*Stout v. Jones*, 57.
4. Evidence as to whether work on a building contract was delayed by putting it off till spring is incompetent, as the fact could be determined without the aid of the opinion of experts.—*Id.*
5. A requirement of the contract that orders for extra work and material shall be in writing and signed by the parties may be waived by their acts.—*Id.*

6 A contract not to engage for ninety-nine years in a certain business in any of the States or territories of the United States except two named, made on a sale of said business, being partial and not in general restraint of trade, is valid.—*The Diamond Match Co. v. Roeber*, 174.

7. The doctrine as to what is the general restraint of trade does not depend on State lines.—*Id.*

8. The fact that the covenant is practically unlimited as to time is not an objection, the contract being otherwise good.—*Id.*

9. The jurisdiction of the court to enforce the covenant by injunction is not affected by the fact that a bond for its performance was given with a stipulation for liquidated damages.—*Id.*

10. An action for such enforcement may be maintained by a foreign corporation.—*Id.*

11. The evidence as to what the contract in fact was between plaintiff and defendant was conflicting, and plaintiff made tender of payment by leaving the purchase price of the sheep he had agreed to buy at the price which by his version of the contract he had agreed to pay, which sum defendant had refused to accept and deliver the sheep, denying that such was the agreement. *Held*, That it was error for the court to charge "that the payment of the money by plaintiff to defendant's daughter for the benefit of defendant is evidence of the good faith of plaintiff in carrying out the agreement made or alleged to have been made by plaintiff with defendant," the effect of the evidence and its bearing on the disputed question of fact was not a question of law for the court but a matter of inference for the jury.—*Hyde v. Payne*, 256.

12. Where a provision of an executory contract may be treated as a covenant rather than a condition, its importance and effect in an action for the consideration money depends upon the fact whether it is a substantial part of the contract and of the consideration for defendant's promise to pay, and where nothing appears to prove or from which it can be inferred that it forms a substantial part of the consideration an offer of performance is not prerequisite to the plaintiff's right of action.—*Kirtz v. Peck*, 268.

13. Where a contract provides for the doing of certain work on notice or demand, a refusal to perform excuses the other party from making any demand or serving any notice.—*Robinson v. Frank*, 336.

14. The complaint alleged that the parties trafficked upon the market value of

wheat; that orders were given and a margin paid defendant to secure him against a decline in the market value; that if that value advanced plaintiff was entitled to the advance; that the transactions were based on the fluctuations of the market value; that defendant had closed the transactions on the basis of the market and had retained the margin of \$2,585, which plaintiff sought to recover. On demurrer, *Held*, That the complaint stated a wagering contract, and the latter was void.—*Peck v. The Doran & Wright Co*, 399.

13. Defendant having failed to keep his agreement to deliver a lecture upon receiving a certain sum from plaintiff, the latter to be entitled to the whole sum realized from the sale of tickets, *Held*, that plaintiff's loss of profits was an element of damage to be considered by the jury. And although by the contract it was made a condition precedent that defendant should be paid before lecturing, yet having repudiated the contract defendant could not demand performance of such precedent condition.—*Savery v. Ingersoll*, 426.

16. The word "dividends" as used in banking, railroad and other business associations, is that portion of the profits which is set apart and divided by the managers or directors of the corporation among the stockholders. This separation and division is not a growth, but an act; and dividends cannot accrue until declared.—*Parks v. The Automatic Bank Punch Co.*, 562.

17. The phrase "dividends accruing" used in the contract between the parties hereto defined and applied in accordance with above principle.—*Id.*

See COMMON CARRIERS, 1; FIRE INSURANCE, 3; SALE, 1, 7.

CONVERSION.

1. Certain bonds which stated that on default in the interest the principal should become due were stolen from plaintiff and purchased by defendants some years after and after default had been made and a foreclosure of the mortgage begun. In an action for conversion, *Held*, That defendants were not *bona fide* holders, having purchased paper which was overdue at the time, and it not appearing that those of whom they purchased were *bona fide* holders who had purchased before maturity.—*The Northampton Bank v. Kidder et al.*, 165.

2. While lawful possession of personal property is evidence of such title as to support an action for conversion against a mere wrongdoer or stranger to the title,

yet such possessor cannot assert such right of title against a sheriff who takes such property and sells it by virtue of an execution against him.—*Chamberlain v. Darrow*, 200.

8. Treating plaintiff as an executor *de son tort* he could not maintain an action in a representative capacity and make the title which his wife had at the time of her death available against defendant.—*Id.*

4. In an action against defendants as commissioners of highways to recover the sum stipulated for constructing a bridge in pursuance of a contract, the plaintiff was defeated upon the ground that the action was barred by the statute of limitations. Subsequent to the commencement of the action, but before service of the complaint, plaintiff became aware that defendants had converted the property by a sale and delivery of the materials composing the bridge to a third person. After the unsuccessful termination of that suit, plaintiff brought this action for the conversion. *Held*, That plaintiff having elected to continue the prosecution of his action upon the contract, with cognizance of the conversion of the property, was thereafter precluded from resorting to an action of tort; the remedies are inconsistent, and plaintiff having made his election, he is confined to the one he first preferred and adopted and cannot afterward resort to the other although unsuccessful in the first.—*Boots v. Ferguson et al.*, 358.

5. An injunction restraining one from disposing of or in any manner interfering with personal property does not prevent the party from bringing an action for damages where the property is wrongfully taken out of his possession by a third party, and it seems he might bring an action to recover it.—*Van Wagoner v. Terpenning*, 434.

6. A judgment determining that plaintiff is the owner of a certain oil well drilled by defendant on lands leased by the former of the latter, precludes defendant or his bailee from questioning the title to the oil drawn from the well, in an action brought for the conversion thereof. And such judgment estops defendant or his bailee from showing that the well was drilled under an agreement that defendant should have one acre out of the leased territory in which to drill the well, and that it was done with plaintiff's permission.—*Hughes v. The United Pipe Lines*, 561.

7. An action for conversion may be maintained against a pipe line company, as bailee, to recover the value of certain oil drawn from a well owned by plaintiff, and stored in the pipes and tanks of the

company, even though it has been commingled with other oils and its identity is lost.—*Id.*

See COMMON CARRIERS, 8; PARTNERSHIP, 9; TENANTS IN COMMON.

CORPORATIONS.

1. The liability of a shareholder to pay for stock does not arise out of his relation, but depends on his contract or upon some statute, and in the absence of these grounds of liability he does not make himself liable to pay the face of the shares as upon a subscription.—*Christensen v. Eno*, 89.
2. Certain stock was issued to defendant which was credited as part paid although not in fact paid. He paid the balance. *Held*, That the transaction, as between him and the corporation, was binding, and that the amount so credited did not constitute a trust fund for the payment of creditors and could not be reached by a creditor.—*Id.*
3. Pending an action to dissolve a corporation an action was commenced to foreclose a mortgage given by it, in which action it was decided that certain property not in terms covered by the mortgage was in fact covered by it. *Held*, That all the parties to that action were bound by the judgment and that it could not be impeached in a collateral action by the corporation or its general creditors; that the unsecured creditors were not proper parties to such action, or entitled to notice until the appointment of a final receiver; nor even then except as to their rights in such property as comes to the receiver to be distributed by him.—*Herring v. The N. Y., L. E. & W. RR. Co.*, 45.
4. The rule that a receiver's title relates back to the commencement of the action does not apply to a case where property has been legally disposed of under the direction of the court.—*Id.*
5. The confession of judgment prohibited by § 71 of 2 R. S., 469, is a voluntary one made without the interference of the court.—*Id.*
6. In the annual report of the trustees of a manufacturing corporation the amount of capital paid in cash is not required to be separately stated.—*Whitaker v. Masterton et al.*, 58.
7. Neither a receiver appointed in a creditor's action, nor one claiming under him can enforce the liability of a stockholder of a corporation for the balance due on his stock under § 10 of the Manufacturing Act, or 1 R. S., 600, § 5.—*Tucker v. Gilman*, 274.
8. In proceedings under the act of 1878 for the issue of new certificates of stock, it must appear that the petitioner is the owner of the shares and that the certificates of such shares have been lost or destroyed, and cannot after due diligence be found.—*In re Biglin v. Friendship Assn.*, 302.
9. Whenever an existing stockholder is divested of his interest in or control over the affairs of a corporation, whether by voluntary transfer or by compulsion, as by forfeiture on the declaration of the company, time begins to run, and at the end of two years the statutory limit is reached and no action can be maintained against him; the same result follows on the actual dissolution of the corporation by formal judgment.—*Hollingshead v. Woodward*, 306.
10. In an action against a stockholder in a corporation formed under the limited liability act of 1875, to charge him with a debt of the company on the ground of failure to fully pay up his stock and that the stock of the company was not paid in full, it must appear that plaintiff's claim is not only in judgment, but that execution has issued against the company and been returned unsatisfied.—*Richards v. Beach*, 355.
11. In an action by a judgment creditor of a corporation organized under the limited liability act of 1875, against a stockholder thereof, seeking to charge him with the amount of the judgment, on the grounds that the capital stock of the company is not paid in full, it is a sufficient defense that such stockholder is himself a creditor of the company to an amount equaling his stock. But such a defense would not be good in an action against a director for joining in a false annual report.—*Richards v. Kinsley*, 372.

See ANIMALS, 2; BROKERS; CONTRACT, 10, 16, 17; DEPOSITIONS, 8; PARTIES; RECEIVERS.

COSTS.

1. Where a motion for a new trial is made upon the minutes, motion costs only are allowable.—*Neuman v. French et al.*, 83.
2. The complaint alleged a partnership between plaintiff and his father, the investment by the latter in his own name of assets of the partnership and the receipt by him of large sums in rents and dividends from such investments, and prayed for a dissolution and an account of such receipts. Judgment was rendered for defendants and an extra allowance was granted them. *Held*, That one-half the securities and money mentioned constituted the subject matter, that one-half the amount stated furnished the basis

of computation for an extra allowance, that a case was made for the exercise of the discretion of the trial judge, but that his decision was subject to review by the General Term.—*Adams v. Arkenburgh et al.*, 132.

8. Section 3245 of the Code does not apply to an action to recover damages for injuries caused by the negligence of the servants of a municipal corporation.—*Hunt v. The City of Oswego*, 237.

4. In an action of ejectment plaintiff sought to recover by the complaint the whole of certain premises. The answer denied all the allegations of the complaint. Testimony was given as to the possession of the entire premises and the verdict given for defendant was general. After the judge's charge plaintiff's attorney handed to the court a paper describing a small strip of the premises and said that as to that strip he claimed plaintiff's title was established. The value of the whole premises was shown, but not that of this strip. On a motion for an extra allowance the court held that the subject matter involved was the strip and denied the motion upon the ground that its value did not appear. *Held*. Error, that the whole premises were involved.—*Burton v. Tremper*, 246.

5 An application for security for costs under § 3271, Code of Civil Procedure, cannot be made regularly *ex parte*.—*Swift v. Wheeler*, 512.

See EXECUTORS, 2; REFERENCE, 3; SCHOOLS, 1; VAGRANTS, 4; VILLAGES, 1, 2.

COUNTY.

1. The treasurer of the county executed notes purporting to be issued by authority of the board of supervisors, but no such authority existed. Plaintiff disallowed them and the proceeds were used to apply on the treasurer's account with the State treasurer. *Held*. That an action on said notes against the county was not maintainable. The county is not responsible for the defaults or omissions of the county treasurer in respect to the moneys due the State in any other manner than the law has declared.—*The First Nat. Bk. v. Suprs. of Saratoga Co.*, 168.

2. The power of a county as a contracting party is limited by statute and can only be exercised by the board of supervisors or in pursuance of a resolution adopted by them.—*Id.*

See BOUNTIES.

COUNTY COURT.

See APPEAL, 4.

COVENANT.

1. Where the owner of a parcel of land encumbered by two mortgages, for both of which he was also personally liable, conveyed a portion to defendant, who assumed and agreed to pay them as a part of the purchase price, and afterward conveyed the remainder to B. by a quit claim deed, and upon default in payment the mortgages were foreclosed and the whole parcel sold to satisfy the mortgage debts. *Held*. That B. was entitled to maintain an action upon the covenant to recover the value of the parcel lost to him by reason of defendant's failure to pay the mortgages and the consequent foreclosure sale.—*Wilcox v. Campbell*, 30.

See CONTRACT, 6-10; DEEDS, 8, 9; LEASE, 1.

CREDITOR'S ACTION.

1. In a creditor's action a claim to set aside as usurious a mortgage given to one party cannot be joined with a claim to set aside as fraudulent a deed to another party where the two transactions are independent and not parts of one fraudulent scheme.—*Marx et al. v. Taiter*, 71.

2. Where in a creditor's action to set aside conveyances made by the debtor to several grantees one of said grantees settles and obtains a discontinuance as to his property on payment of a sum of money which is not specifically applied, said sum must be applied on the plaintiff's judgment.—*Kittel v. Jones*, 323.

3. The question whether a conveyance made in good faith or not is one of fact and not necessarily controlled by the fact whether the purchase price paid is more or less than its value.—*White's Bk. of Buffalo v. Farthing et al.*, 507.

4. Part performance of an oral agreement to sell and purchase land furnishes the right to equitable relief, notwithstanding the statute of frauds, and where a party agrees to give a lot to another on condition that the party to whom it is given makes improvements on said lot, which improvements are made, this performance constitutes a valuable consideration for the oral promise such as to support a claim for specific performance, and takes the agreement out of the statute, and a devisee takes title to such lands subject to such agreement.—*Id.*

5. Facts testified to by parties to an action not found by the court are, for the reason of the relation of the witnesses to the action and their interest, because the question is one of credibility, not to be treated as established as against facts found by the court.—*Id.*

6. While the notes on which the action was

brought were made subsequent to the conveyances sought to be aside, yet if they were the last of a series of renewals, although the creditors were indorsers and the notes were paid from time to time through the process of renewals, yet as between the creditors and the indorser the debts evidenced by the notes may be properly treated as that or a portion of it for which the first of the series of notes were made.—*Id.*

See BILL OF PARTICULARS, 1; CHATTEL MORTGAGE, 5; CORPORATIONS, 7, 11.

CRIMINAL CONVERSATION.

See JURISDICTION, 2-4.

CRIMINAL LAW.

1. An order removing the indictment from the Oyer & Terminer to the Court of Sessions is essential to the jurisdiction of the latter court; but the bare fact that no order appears in the record does not show that one was not made, and in the absence of proof to the contrary its existence will be presumed.—*The People v. Bradner*, 272.
2. Where the defendant pleaded not guilty, but subsequently withdrew the plea and moved to dismiss the indictment, which was denied, and the record showed no formal renewal of the plea, but the case was tried on that issue, *Held*, That it could be inferred all parties regarded the plea as withdrawn for the purposes of the motion only and as having been reinstated.—*Id.*
3. A motion for a new trial on the ground of newly discovered evidence must be made before judgment, and it is not error for the court to deny a motion to vacate the judgment to enable such motion to be made.—*Id.*
4. The mere omission of the clerk in the entry of judgment to state the offense of which defendant was convicted will not render the sentence void; such defect is amendable.—*Id.*
5. A judgment entered against surety and principal respectively on a forfeited recognizance will be cancelled on motion where it appears that subsequent to the forfeiture the accused person appeared, was tried, and paid the fine imposed.—*The People v. Boessemeecker et al.*, 387.
6. The omission to administer the oath to officers provided by § 412, Code Crim. Pro., placed in charge of a jury when a view of the premises where the crime was committed is ordered by the court, is a mere irregularity, and will not require or justify a new trial unless there

was some opportunity to conclude that the defendant was prejudiced thereby.—*The People v. Johnson*, 519.

7. That such a view of the premises in some sense is evidence, and when it does not appear whether the defendant was present or not, but that the counsel assisting in the trial for the defense was present, and the prisoner was not denied the right to be present, no ground for a new trial is afforded.—*Id.*

See APPEAL, 17; ASSAULT; BASTARDY; BRIBERY; DAIRY LAW, 1; EVIDENCE, 7, 9; FORGERY; LARCENY; MURDER; PERJURY; ROBBERY; VAGRANTS.

DAIRY LAW.

1. In a prosecution under Chap. 188, Laws of 1885, for selling adulterated milk evidence of an absence of criminal intent is inadmissible; the act alone, irrespective of its motive, constitutes the crime.—*The People v. Kibler*, 58.
2. Section 3 of Chap. 188, Laws of 1885, invades neither life, liberty nor property, and is not unconstitutional.—*The People v. West*, 68.

DAMAGES.

See CONTRACT, 15; EMINENT DOMAIN, 2; FALSE REPRESENTATIONS, 2; LEASE, 3, 4; NEGLIGENCE, 12, 13; SALE, 6.

DECEDENT'S ESTATES.

1. The statute providing for the reference of claims against a decedent does not contemplate affirmative relief against the claimant further than is requisite to defeat a recovery.—*Hovey v. Hovey*, 259.
2. A stipulation made in a proceeding pending before a referee appointed under such statute, by which it is sought to confer upon the referee power in excess of that permitted by the statute, will not have the effect to extend the jurisdiction of the referee, nor will it have the effect to produce an arbitration and make the referee's report a common law award.—*Id.*
3. The questions arising on the result given to such stipulation by the report of the referee can only arise upon a motion for confirmation or review as the practice in such case requires.—*Id.*

See EXECUTORS, 6; TAXES, 1, 6, 12, 13.

DECEIT.

1. Allegation that defendant, knowingly and fraudulently, sold and conveyed to a company property to which he had no title; that the company believing it

owned the property issued stock; that plaintiff believing the stock valuable bought some; that it was intrinsically worthless, though an apparent value was given to it by fictitious sales, known as "wash" sales, at the mining exchange, which defendant had made—it not being alleged that any transactions were had with, or representations made to plaintiff, other than as above, are insufficient to support an action for deceit.—*McGlynn v. Seymour*, 586.

DEEDS.

1. A deed conveyed certain premises to a town "to be used as a highway" with the usual covenant of warranty. *Held*, that it conveyed the fee and not an easement merely; that the restricting clause operated only as a condition subsequent, and the fee remained in the town until breach and a re-entry by the grantor.—*Vail v. The L. I. R.R. Co.*, 65.
2. The acquisition by a town by a voluntary grant of a fee in land for highway purposes is not *ultra vires*.—*Id.*
3. The owner of a hotel conveyed certain land adjoining to a railroad company for a depot, the intervening strip being designated as a street, but it was never accepted by the authorities. Subsequently two of his heirs conveyed half of said strip to said company by deed which provided that the company should maintain an opening opposite to the hotel for passage of passengers and their baggage. Plaintiff leased the hotel and defendant built a fence obstructing all passage to the hotel. *Held*, That the condition as to an opening was a covenant running with the land and that such covenant makes the right of access and transit across said strip an easement appurtenant to the hotel and that plaintiff as lessee could maintain an action to restrain defendant from continuing said fence, but that the judgment should provide simply for an opening of the proper size and large enough for the convenient access of passengers and their baggage.—*Avery v. The N. Y. C. & H. R. R.R. Co.*, 146.
4. Testator devised certain property to his wife for life with remainder to his children, the will giving the executors a power of sale. The widow married one E. who made improvements to the land. The executors sold two lots for more than their value to one S., who built thereon and sold to E., who made other improvements. In an action by the children to set aside the deeds, *Held*, That if they could establish a right to the property they would be only entitled to judgment therefor on condition of refunding to E. the amount originally paid by him and the value of the improvements to the extent they have added to its permanent value.—*Thomas et al. v. Evans et al.*, 152.
5. A deed described the land conveyed as being Lot No. 8, lying southerly of Fish Lake and commonly called the Fish Lake lot, supposed to contain 67 acres. The Fish Lake lot contained 600 acres, all covered by the lake, except 67 acres lying south and 7 acres north of the lake. *Held*, That the deed did not cover the 7 acres.—*Case v. Dexter et al.*, 240.
6. Where there is any doubt on the proof as to the intention of the parties as to the subject of the grant it is error to reject oral evidence to explain it.—*Id.*
7. W. executed a deed to D. of her share in certain land for the purpose of enabling him to raise money to pay taxes on lands of her husband held by D. as security for claims against the husband. She delivered it to her husband to give to D. She afterwards fully paid said taxes to D. *Held*, That the deed was an equitable mortgage, and the condition being fulfilled no title or lien on the property was left in D.—*Gilbert v. Deshon et al.*, 821.
8. Where a grantor causes a deed to be recorded it is *prima facie* evidence of delivery and the deed will be held effectual even though the grantor did not inform grantees of its execution, especially when no dissent is shown upon their part.—*Messelback v. Norman*, 418.
9. One N. owned land containing deposits of building sand, the sale of which constituted his business. He sold a part of the land to S. by deed containing a covenant that S. would not sell any sand from the land. *Held*, That the covenant was good between the parties and bound in equity whoever took the title with notice of such covenant, although not contained in the subsequent deeds, and that an action would lie to restrain such sale.—*Hodge et al. v. Sloan*, 457.

See COVENANT; EASEMENT, 1, 4; RELIGIOUS CORPORATIONS.

DEPOSITIONS.

1. An order vacating an order for the examination of a plaintiff before trial is not reviewable in the Court of Appeals. Section 878 is not absolutely mandatory and was not intended to deprive the judge of all discretion.—*Jenkins v. Putnam*, 82.
2. An affidavit for such order must show that the facts are not perfectly known to the defendant and that it is important for him to have the testimony of plaintiff before trial or reason to apprehend that

he could not have his examination on the trial.—*Id.*

8. A commissioner to take testimony should be a person who has no bias or prejudice in reference to the litigants or the cause. *McLean v. Adams*, 96.

4. Where a party thinks his right to a fair and unbiased commissioner has been denied him he may appeal without waiting the return of the deposition or moving to suppress it.—*Id.*

5. Where an order for examination of a defendant before trial and production of books has been set aside on the ground that an offer to allow an inspection of books has been made, and permission to inspect has been afterward denied, it is too late to renew such offer after a second order of examination has been obtained.—*Phillips v. The Germania Mills*, 107.

6. Where it appears by plaintiff's contradicted affidavits that defendant was employed by plaintiff, as a broker, under a discretionary power to buy and sell shares of stock, etc.; that plaintiff, on defendant's demand advanced large sums ostensibly for margins, and suffered great loss by the transactions; that defendant made false reports to plaintiff charging him more than market prices for purchases, and crediting him with less than market prices on sales, and that this is corroborated by records of the exchanges, etc., *Held*, That in view of the nature of defendant's employment he was the only person acquainted with the special facts, and plaintiff was entitled to an order for his examination to enable him to frame his complaint.—*Judah v. Lane*, 362.

7. It is no valid objection to the granting of such an order that the papers allege facts which show more than one cause of action, or more than one theory of recovery; nor is it a good objection to the granting of such an order for examination of defendant that "its tendency might be to criminate him or make him liable to a penalty or forfeiture."—*Id.*

8. In an action to enforce the liability of a trustee of a corporation for failure to file a report where the cause of action arose many years before the commencement of the action and all the parties from whom defendant could procure information are dead, he may be allowed to examine the plaintiff before trial as to the manner in which he became the owner of the claim on which the action is founded.—*Carr v. Risher*, 456.

See APPEAL, 8.

DIVORCE.

1. The referee to whom it was referred to

hear, try, and determine the issues in an action for divorce for adultery, in which the answer alleged as a counterclaim that plaintiff had been guilty of the same offense, reported that defendant had committed adultery, but his report was silent as to the recriminatory charges. *Held*, That the omission to find upon the issues respecting plaintiff's adultery is fatal to a judgment of divorce in her favor, notwithstanding it does not appear that defendant requested a finding upon his counterclaim, or excepted to the report on account of the alleged defect, or asked to have the report sent back for further findings, and although the evidence supported the finding of defendant's guilt.—*Paul v. Paul*, 227.

2. An action to set aside a judgment of nullity of marriage on the ground of fraud in contracting it cannot be maintained on the ground that plaintiff was fraudulently induced to refrain from defending it where the complaint or proofs do not deny the fraud charged in the former action or show that there was any defense on the facts.—*Blank v. Blank*, 269.

3. In an action for separation on the ground, among others, that defendant accused plaintiff of adultery without probable cause, plaintiff may testify as to her innocence, although the answer charges such adultery and asks for absolute divorce.—*Demeli v. Demeli*, 292.

4. Under Chap. 103, Laws of 1887, a husband or wife may now testify against the other to disprove an alleged adultery.—*Id.*

5. A decree of a foreign court dissolving a marriage between a citizen of that State and a citizen of this State is void for want of jurisdiction where the process was not personally served or the defendant personally appears.—*Cross v. Cross*, 511.

DOWER.

1. B. and wife conveyed property by a grant in fee reserving an annual rent, but also providing that on any rent day the grantee might pay a gross sum in extinguishment of all future rent. Plaintiff's husband acquired the grantor's rights and assigned them to H., plaintiff not joining in the assignment. H. conveyed to A. and the latter soon after acquired the grantee's rights. In an action by plaintiff for dower, *Held*, That the estate was a defeasible fee, and that when A. acquired the rights of both grantor and grantee there was a merger, which barred dower. This merger, though not so in form, was in fact equivalent to the payment of the gross sum which it was

stipulated should defeat the estate.—*Moriarta v. McRae et al.*, 217.

2. A judgment against a husband recovered after marriage is in surplus proceedings a subordinate lien to the wife's inchoate right of dower, and such right of dower may be enforced as such prior lien in said proceedings, though the wife joined in the execution of the mortgage foreclosed, which contained a clause stipulating that the surplus, if any, should be paid to the husband, or those claiming under him.—*The N. Y. Life Ins. Co. v. Mayer et al.*, 502.

DRAINS.

See EASEMENT, 2, 3.

DRUNKARDS.

1. An affidavit relating only to the condition of a person on a single occasion is not sufficient to show that such person is an habitual drunkard.—*In re application of Hoyt*, 341.

DURESS.

1. Defendants had an employee arrested for embezzlement and demanded money of his relatives, threatening to send him to prison unless it was paid. The threats being communicated by arrangement with defendants to the boy's mother she gave a mortgage to them, under the influence of fear induced by such threats. *Held*, That the mortgage was void, and that a proper case was made for its removal as a cloud on title.—*Schoener et al. v. Lissauer et al.*, 863.
2. The limitation of six years provided by § 382, subd. 5 of the Code does not apply to such a case, but the right of the owner to maintain such an action is never barred by the statute so long as the cloud continues to exist.—*Id.*

EASEMENT.

1. The owner of a block of land sold the same in lots to different purchasers, the deeds containing covenants against the erection of nuisances thereon. *Held*, That the covenants were for the benefit of the other purchasers and constituted easements in their favor, and therefore were incumbrances.—*Raynor v. Lyon*, 278.
2. A grantor owned five lots. Four of these adjoined each other on one street while the fifth lot on another street was directly in the rear of the fourth or most easterly lot. He built a drain running through the rear of each of the four lots and then through the fifth lot to the

street in the rear. He first conveyed the third lot (counting from the west) to defendant but reserving to himself no right in the drain. Afterward he conveyed the first or most westerly lot to plaintiffs grantors without mention of the drain. Defendant obstructed the drain. *Held*, That plaintiff had no right of action as the drain was entirely underground.—*Munsion v. Reid*, 388.

3. User in such case begins to run only from the time of actual notice to a person other than the grantor who was the common source of title.—*Id.*
4. Where the right to conduct water from one parcel of land to another across the intervening land of other parties rests in mere parol license, such right does not pass under a deed by the use of the word "appurtenances," nor as an easement by implication.—*Root v. Wadhams*, 474.

See DEEDS, 3; RAILROADS, 24, 25.

EJECTMENT.

1. Certain lands were conveyed to one C. reserving the rights of the grantor to land under water. C. thereafter died leaving a husband and children. Neither C. nor her children had entered upon or claimed the reserved portion, but it appeared that the husband had. *Held*, That the children were not bound by the acts of their father and the joinder of them as parties in an action of ejectment was not justified by § 1503.—*Sisson et al. v. Cummings et al.*, 50.

See COSTS, 4.

ELECTION.

1. An inmate of the State Soldier's Home at Bath, who has left his home in N. Y. City with the intention of making his residence at the Home as long as he should be permitted to do so, is not a resident of Bath or entitled to vote there, but retains the right to vote in the place of his legal residence.—*Silvey v. Lindsay et al.*, 120.
2. Inspectors of election made and signed in duplicate on the night of election a statement of the votes for senator and delivered one to the town clerk and one to the county clerk. Six days later two inspectors made a second statement changing the result. They delivered this to the supervisor, who delivered it to defendants. It appeared that the latter proposed to consider it. *Held*, that the second statement was void; that defendants had committed an error in using the second statement for any purpose and that within Chap. 480, Laws of 1880, a proper case arose for the court to forbid

the use of the second statement and to order defendants to consider in its stead the original filed with the County Clerk. —*The People ex rel. Russell v. Board of Canvassers*, 506.

See AGRICULTURAL SOCIETIES; MANDAMUS; RELIGIOUS CORPORATIONS.

EMINENT DOMAIN.

1. In an action for damages caused by the erection of an elevated railroad in front of plaintiff's premises evidence that business in that vicinity had largely fallen off is admissible as proof of general injury from which the jury is to determine how much thereof was caused by the construction and operation of the road. —*Drucker v. The Manhattan R. Co. et al.*, 87.
2. Smoke and gases, ashes and cinders, drippings of oil, columns, the structure itself and the passage of cars are elements of damage even though the necessary concomitants of the construction and operation of the road and not the product of negligence, and to the extent that they impair the owner's easement of light, air and access are subjects of redress. —*Id.*
3. Under Chap. 490, Laws of 1883, an award for the taking of lands is to include the entire amount awarded to a party affected thereby, and it is not necessary to state separately the sums awarded for lands taken and for damages to contiguous lands. —*In re petition of Thompson*, 195.
4. Mere inadequacy in the amount awarded will not avail on appeal unless the amount is so small or so great as to be palpably erroneous. —*Id.*
5. Chapter 833, Laws of 1872, as amended by Chap. 636, Laws of 1881, contemplates two important objects for which compensation shall be made; for the real estate required for the construction of the road and for the authority to construct and operate, and these objects may be acquired under two separate proceedings. —*In re petition of the Metropolitan Transit Co.*, 267.
6. Under said act an amendment may be made changing the action from one to acquire the lands to one to fix the compensation to be paid the city for the right to construct and operate. —*Id.*
7. By the statute it is made a condition precedent to the right of a railroad company to institute proceedings to condemn lands of which it cannot acquire title by purchase, to give notice of the proposed location of its route to all actual occupants from whom the company has not

acquired title. —*In re application of the N. F. & W. R.R. Co.*, 415.

See RAILROADS, 2, 24, 25; WHARFAGE, 1-3.

ESCHEAT.

See TITLE, 2.

ESTOPPEL.

1. J. S. owned two farms, adjoining. He had bought the southerly farm from one M. S. whose grantor was C. S. J. S. mortgaged the northerly farm and described its southerly boundary as bounded "by lands formerly belonging to C. S. and M. S." Held, That he was estopped by this recital in the mortgage thereafter to set up an adverse possession to any part of the southerly farm as the same was owned by C. S. and M. S. —*Thompson v. Stever*, 440.
2. Where an old deed contained a general description and then referred to a survey by courses and distances and stated that the same was delivered to the grantee and this survey was recorded in the book immediately after the deed, but was not properly certified, and the farm was thereafter repeatedly conveyed and in each case reference made to the record of the old deed, Held, That, if the survey was not admissible as a record, it was still admissible as a description sufficiently identified as the one adopted by the parties. —*Id.*
3. The estoppel of a former judgment or decision extends to those matters which, though not expressly determined, are comprehended and involved in the thing expressly stated and decided, whether they were or were not litigated or decided. —*Van Gelder v. Hallenbeck*, 407.

See BAR; CONVERSION, 6; FERRIES, 3; LIFE INSURANCE, 5; RIPARIAN OWNERS, 2; SALE, 1; USURY, 2.

EVIDENCE.

1. A physician who had formerly attended a patient, but whose services had ceased, may give testimony as to the condition of the patient on subsequent occasions, when he was no longer attending him in a professional capacity, as indicated by outward, visible manifestations, but he cannot disclose any information acquired by him whilst attending in a professional capacity. —*Burley v. Barnhard*, 6.
2. In an action for damages for diverting the waters of a stream from plaintiff's mill a witness otherwise competent may give his opinion of the rental value of a mill so situated, and of what it would be if the water diverted had been permitted

- to flow undiverted from day to day into plaintiff's pond.—*Garwood v. The N. Y. C. & H. R. RR. Co.*, 25.
8. In such a case a practical miller on the same stream, somewhat familiar with plaintiff's mill and its operation, and having some knowledge of the price for which mills sold, and of the effect of the withdrawal of the water from the mill upon its grinding capacity, though not a civil or hydraulic engineer, is a competent witness to express his opinion.—*Id.*
 4. It is proper for a millwright acquainted with the mill and wheels and defendant's pumps, having stated what quantity of water the pumps if continuously operated would take from the stream, to state the grinding capacity of the water so taken if at plaintiff's mill.—*Id.*
 5. It is proper for such millwright in making computations of such grinding capacity to use tables prepared by others which were ordinarily used by millwrights, and by all such considered accurate.—*Id.*
 6. In an action against a beneficiary organization to recover a death benefit, it appeared that the deceased had been suspended, but it was claimed that a resolution of the lodge had been passed reinstating him. To prove this, an officer of the lodge testified that a letter shown him was a copy of one he had written to the grand recorder. The letter was received in evidence, against objection, and there was no other evidence that such resolution had been passed except the statement contained in this letter. *Held*, That as it did not appear that the original letter was lost or destroyed, nor that any notice was served upon defendant to produce it, etc., the copy was inadmissible as evidence.—*Gaige v. Grand Lodge A. O. U. W.*, 49.
 7. Evidence sufficient to corroborate the evidence of an accomplice.—*The People v. Elliott*, 60.
 8. When a party seeks to exclude evidence under § 884 the burden is upon him to bring the case within its purview. He must make it appear that the information objected to was acquired by the witness while attending the patient in a professional capacity, and also that it was such as was necessary to enable him so act in that capacity.—*The People v. Schuyler*, 69.
 9. A jail physician is not precluded by said section from answering a hypothetical question as to a prisoner's sanity based solely on facts occurring before the prisoner was known to the witness, unless it appears that he is incapable of excluding from consideration facts learned and opinions formed while attending him.—*Id.*
 10. In an action by a surgeon for services where the plaintiff testifies that the sum to be charged in such cases depended on the pecuniary condition of the employer, it is error to exclude evidence offered by defendant as to his pecuniary circumstances.—*Lange v. Kearney*, 78.
 11. Where it appears that goods were sold to defendant, but charged to his son, who ran his farm, evidence that former sales charged to the former occupant of the farm were settled for by defendant is admissible.—*Dudley v. Brinkerhoff*, 140.
 12. An inquisition in lunacy is only evidence as to the condition of the alleged lunatic at the time the inquisition was taken.—*Dominick v. Dominick et al.*, 176.
 13. But the submission to a jury of such an inquisition which stated that the person named had been a lunatic for two years prior thereto, without other remarks than that it was not conclusive, is not a ground for setting aside a verdict in the absence of objection or exception to the manner of submission or requests for further instructions.—*Id.*
 14. Evidence admissible on the question of soundness of mind of a testatrix.—*Id.*
 15. In an action brought against an employer for alleged negligence in failing to provide proper and sufficient means of egress for his employees in case of fire; when such a description of the building and of the means of egress can be given as to convey to the jury an intelligent understanding of the situation, the rule requires that the testimony of witnesses shall be confined to a statement of the facts, and that the conclusions or opinions of witnesses be not permitted as evidence. Expert testimony can only be given when elements enter into the subject which cannot be described by witnesses so as to possess the jury with the information requisite to a complete understanding of the subject of inquiry.—*Schwandner v. Birge*, 254.
 16. Upon an issue as to the age of a horse, an impression of the horse's mouth, taken by a veterinary surgeon, may be competent as evidence.—*Earl v. Lester*, 277.
 17. The admission, in the Municipal Court of the city of Rochester, of incompetent testimony, to establish a fact clearly proved by other competent testimony, is not such error as requires the County Court to reverse the judgment on appeal.—*Id.*
 18. The answer set up nonjoinder of one H., as plaintiff, alleging that he was a

partner with plaintiffs and was living when the action was commenced. *Held*, That proof of H.'s death at the date of the trial was admissible and a complete answer to the plea in abatement.—*Groot et al. v. Agens*, 369.

19. At the request of the attorney who drew a will the physicians came to the house of the testatrix on the night the will was drawn to become attesting witnesses. Neither of them had ever attended her. They examined her mental condition and consulted together about it. They said nothing to her about her health and she understood that they were there only to become such witnesses. *Held*, That § 834 did not apply and that their testimony was competent.—*In re will of Freeman*, 432.

20. After testimony of an attending physician is excluded under § 834, it is too late on appeal for defendant to object that the rule did not apply because the physician was not examined as to whether he was "duly authorized to practice." The respondent is now entitled to the presumption that he was so authorized.—*Record v. The Village of Saratoga Spgs.*, 500.

21. Where the physician called by defendant had been in consultation with another physician who afterwards attended plaintiff and plaintiff and the second physician testified to plaintiff's condition, *Held*, that plaintiff did not thereby waive her right to object to the testimony of the first physician.—*Id.*

22. Plaintiff gave no expert testimony as to her probable future condition, but testified to the present condition. *Held*, That a charge was correct which left the matter to the jury, also instructing them to consider that plaintiff might have given expert testimony as to her future condition but had not done so.—*Id.*

23. A party who calls his adversary as a witness cannot impeach his character for truth, but is at liberty to dispute specific facts though sworn to by him.—*Cross v. Cross*, 511.

24. Under § 829, Code Civ. Pro., one who is made defendant in an action, but who was not served with summons and has not appeared, and against whom no judgment can be recovered on the demand in suit, may testify in behalf of a co-defendant as to transactions with plaintiff's decedent.—*Ehrmann v. Scheuermann*, 551.

See AGENCY, 2, 4; ASSIGNMENT FOR CREDITORS, 4, 5; BASTARDY; BRIBERY; CHARACTER PARTY, 2; CONTRACT, 1, 4; DEEDS, 6; DIVORCE, 3, 4; EMINENT DOMAIN, 1; ESTOPPEL, 2; EXECUTION, 8; EXECUTORS,

1, 9; FIRE INSURANCE, 13-15; FORGERY; LARCENY, 1-3; LEASE, 6, 10; MARINE COLLISION; MARRIAGE, 4; MARRIED WOMEN, 2; MORTGAGE, 10, 11, 17; MUNICIPAL CORPORATIONS, 7; NEGLIGENCE, 2, 8, 9, 19, 28; NEGOTIABLE PAPER, 10; PERJURY, 4-6; RAILROADS, 11; REFLEVIN, 1; SERVICES, 1, 8; SLANDER, 1-8; SPECIFIC PERFORMANCE, 2; WILLS, 31.

EXCISE.

1. An action may be maintained by a taxpayer, under Chap. 531, Laws of 1881, against the commissioners of excise of a city, in a proper case and with the requisite averments in the complaint, to enjoin them from compromising, settling or discharging a judgment obtained by them for penalties imposed by the excise law, which judgment had been affirmed and an appeal was pending in the Court of Appeals, except upon full payment thereof; and also to restrain them from removing their attorney of record and appointing another in his stead, in order to carry out their plan or scheme to defraud the city.—*Standard et al. v. Burtiss et al.*, 844.

2. Complaint in such an action held sufficient.—*Id.*

3. In such an action, where the judgment debtors are alleged to be planning and attempting to settle and discharge the judgment without paying it, etc., they may be made parties to the action and be enjoined from doing anything which may tend to accomplish the illegal acts alleged.—*Id.*

See REMOVAL, 4.

EXECUTION.

1. The term householder as used in §§ 1890, 1891, Code, imports the master, or head of a family; one who has a house in which he resides, but who has no family for which he provides, is not entitled to the statutory exemption.—*Chamberlin v. Darrow*, 300.

2. It is the duty of a constable to make search for property of the judgment debtor to satisfy an execution before making an arrest, and if he make the arrest without first having made diligent search he is liable, provided the judgment debtor has property openly visible in his possession subject to levy.—*Blakeley v. Weaver*, 201.

3. It is no good reason for failure to proceed to levy and sell because the property is insufficient to satisfy the execution unless the value of the property is so small that there is no reasonable possibility of

- realizing anything to apply on the judgment. The officer must satisfy it so far as he can before making an arrest.—*Id.*
4. After an arrest has been made the constable is not required to take anything but the money in satisfaction of the judgment to release the judgment debtor from custody.—*Id.*
 5. It cannot be held as a matter of law that a constable is required to make inquiry of the judgment debtor whether he has property or not out of which to make the execution before making an arrest on execution.—*Id.*
 6. Where a justice of the peace removes from the county and deposits his docket book, etc., together with his certificate with the town clerk, as prescribed by the Code, an execution issued by him is properly returned to the town clerk.—*Hampton v. Boylan et al.*, 886.
 7. Where a justice issued a body execution through mistake, and plaintiff's attorney directed the constable to disregard it, as it was void, the constable is not liable to plaintiff for disobeying the command of the execution.—*Id.*
 8. An attorney employed to prosecute an action in a Justice's Court is competent, in an action against the constable for breach of duty, to testify to the fact of his employment and that he was authorized to attend to the execution, and that he instructed the constable that it was void.—*Id.*
 9. Proof that a judgment debtor is a householder having a family for which he provided and owned and used a horse in his business, that such horse was worth less than \$150 and that he had no other property named in § 1391 amounting with the horse to \$250, is sufficient to show that the horse is exempt from sale on execution.—*Knapp v. O'Neill*, 417.
 10. The debtor is entitled to choose his own business to support his family, and it is not error to refuse to charge that if it was possible to do so in some other way the horse was not exempt.—*Id.*
- See APPEAL, 12; PARTNERSHIP, 7.

EXECUTORS, ETC.

1. An executor, on the final settlement of his accounts, having shown authority from his testator to furnish goods, etc., to a third party, on account of his testator, is competent to give evidence of the fact that he did furnish such and what goods, as such evidence does not call for a personal transaction between the witness and his testator; but, although such evidence is erroneously rejected, such error does not require a reversal of the degree of the Surrogate's Court, if it can be seen that no prejudice resulted, or could result from such error.—*In re settlement of Hall*, 84.
2. An executor, who was also an heir, brought action to recover assets and was defeated. An order was granted charging him personally with the costs on the ground that he should have brought the action individually. The General Term held that he was not guilty of bad faith, but was chargeable with one-half the costs as he was beneficially interested to that extent. *Held*, Error.—*Hone v. De Peyster*, 133.
3. Provisions of will sufficient to indicate an intention that the executor should also act as trustee.—*In re estate of Hutchinson*, 218.
4. A provision in a will empowering the executor to terminate any business connection which existed or might continue by virtue of arrangements made by testator gives the executor no authority to continue the business and subject the estate to the hazards of commercial business.—*Id.*
5. The Surrogate's Court has jurisdiction to entertain a motion made upon the petition of a creditor for the removal of an administrator under § 2685, Code Civ. Pro., and for the purposes of such motion determine the issue going to the relation of the petitioner as creditor.—*In re petition of Wheeler*, 276.
6. Where a claim against decedent's estate is presented to an administrator before the completion of the publication of the notice for presentation of claims, and the same is rejected, an action thereon must be commenced within six months after such rejection, unless the same is referred as prescribed by the Code.—*Cramer v. Bedell*, 340.
7. Where, in an application by the public administrator of N. Y. City for letters of administration no one appears on his behalf on the return day of the citation, and counsel for the widow and next of kin appear, but no order is made, the surrogate loses jurisdiction.—*In re estate of Page*, 472.
8. After a decree had been entered in a final accounting an executor applied to the successor of the surrogate who made the decree and stated by petition that he had not been allowed commissions on a certain sum in his account. The surrogate opened the decree and allowed the commissions. *Held*, That no case was made for opening the decree.—*In re estate of O'Neil*, 490.

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9. In a proceeding before the Surrogate's Court for the final settlement of the accounts of the administrators an administrator is a competent witness to give evidence of personal transactions between him and his intestate to show the administrators are not chargeable with alleged assets with which contesting creditors are attempting to surcharge their accounts.—*In re settlement of Babcock et al.*, 529.

10. The surrogate directed the administrator to apply the moneys due from the estate to the defendant upon his several notes held by the administrator. The administrator applied the amount upon one of the notes, which it satisfied, and then recovered judgment upon the others. Assuming that the surrogate had no power to make such order or decree, yet, *Held*, That the administrator had a right to make such application, and having done so, the defendant was not entitled to have the moneys found due him by the decree of the surrogate applied in part payment of said judgment.—*Alexander v. Durkee*, 570.

See CONVERSION, 3; DECEDENTS' ESTATES; LIMITATIONS, 3; SURETYSHIP, 1.

EXEMPTION.

See EXECUTION, 1, 9, 10.

EXTRA ALLOWANCE.

See COSTS, 2, 4; PARTITION, 5.

FACTORS.

1. Where a commercial correspondent advances his own money or credit for the purchase of property and takes the bill of lading in his own name, looking to such property as the reliable means of reimbursement up to the moment when the original principal shall pay the purchase price, he becomes the owner of the property and not its pledgee.—*Moors v. Kidder et al.*, 97.

2. Such agent indorsed the papers in blank and entrusted them to the principal for the purpose of entering the goods at the custom house and warehousing them in the name of the agent. The principal entered them in his own name and pledged them to plaintiff who relied on his representations and the warehouse receipt. *Held*, That plaintiff obtained no title and could not maintain an action to recover the goods.—*Id.*

FALSE IMPRISONMENT.

See APPEAL, 19.

FALSE REPRESENTATIONS.

1. A purchaser of goods represented to the seller's agent that he was worth between \$3,000 and \$4,000 above all liabilities, that his stock of goods was free from incumbrance, and that all he owed he owed to J. S., whom he introduced. J. S. was a creditor for \$2,800, and an accommodation endorser for \$3,000, and held mortgages on the stock as security, which were duly filed; and there were other debts amounting to \$2,265. The price of the goods sold was \$222. Five weeks afterward J. S. purchased the whole stock, and in payment discharged the mortgages and assumed payment of the accommodation notes, and paid T. \$1,500 in cash. The statement of T. was false, and his entire assets at the time was no greater than the amount of his liabilities.—*Held*, That as the verdict was for defendant, an attaching creditor, it must be assumed that the justice failed to find any fraudulent intention on the part of the purchaser in making the misrepresentation as to his financial ability; and as the question of fraudulent intent in cases of this character is ordinarily one of fact, the determination of the justice could not, in such a case as this, be set aside as being against the weight of evidence.—*The Estey Mfg Co v. Waring*, 40.

2. Where defendant sold premises to plaintiff upon which there was a valid mortgage, of which fact plaintiff was ignorant, *Held*, That the latter could maintain an action for false representations in the sale. The measure of damages would be the amount of the mortgage and interest.—*Cross v. Divine*, 454.

FENCES.

1. Plaintiff and defendant owned adjoining farms. Defendant neglected to maintain his part of the division fence and plaintiff's colt passing through the opening fell into a morass on defendant's farm and was drowned. *Held*, That plaintiff could not recover.—*Crandall v. Eldridge*, 484.

2. The statutory duty as to division fences imposed by Chap 261, Laws of 1838, concerns only adjoining owners and is not a duty due to the public. Hence a failure to comply with the statute is to be measured as to its penalty by the statute, and that penalty cannot be enlarged.—*Id.*

See RAILROADS, 22, 23.

FERRIES.

1. Defendant's ferry, so far as it carries passengers between the city and the points at which it stops in Staten Island and New Jersey, infringes upon the fran-

chises of the city, and to that extent defendant may be restrained from maintaining it.—*The Mayor, etc., of N. Y. v. The New Jersey Steamboat Co.*, 111.

- 2 The city of New York has exclusive right to all the ferry franchises to and from it, and where it has established ferries sufficient to accommodate the public it may maintain an action to restrain others from invading its rights.—*The Mayor, etc., of N. Y. v. Starin et al.*, 124.
3. The fact that a steamboat company has a coasting license gives it no authority to invade the city's ferry rights, and where it does so it cannot question the manner in which the city had leased the franchise.—*Id.*
4. A mere leasee of the boats of said company is not a proper party to an action to restrain it.—*Id.*
5. Any one who invades the franchises of another by running a ferry is liable for any damages he may cause such other and may be restrained by the court.—*Id.*

FIRE INSURANCE.

1. Plaintiff in applying for insurance stated that the house was unoccupied, but defendant's agent entered the statement incorrectly, and plaintiff signed the application without reading it. The agent had been accustomed to fill in the answers to defendant's knowledge. *Held*, That the agent's error could not be imputed to plaintiff.—*Bennett v. The Agricultural Ins. Co.*, 87.
2. A condition in a policy that it should be void if the premises ceased to be occupied does not apply to a risk taken on an unoccupied house.—*Id.*
3. Defendant's agent agreed to insure plaintiff a certain sum on his store and stock, but leaving it to be understood that he would make application to the companies he represented and get the rates as low as possible. After writing policies in different companies, which were successively rejected, the agent, on May 28, wrote out a policy in defendant company, which he delivered the day after the fire (June 1), upon receiving the premium, but the company promptly repudiated the transaction. *Held*, That no oral contract of insurance had been consummated prior to the issuance of the policy.—*Diver v. The London & Liverpool Ins. Co.*, 81.
4. Though proofs of loss may be fatally defective in that they do not accord with the terms of the policy, yet if the proofs are retained by the company, with no notice of their insufficiency as to particular omissions or defects, but only a notice that the company has not waived and does not and will not waive anything, and expressly reserves any and all objections to any and all claims that have been or may be made by the insured against the company, there was an implied waiver of the conditions.—*Karelsen et al. v. The Sun Fire Office*, 148.
5. A policy provided that it should be void if the risk was increased, and that the working of carpenters, etc., in building, altering or repairing without consent should cause a forfeiture. The premises were occupied as a grocery when insured; they were afterward leased to be used in drying fruit, which necessitated alterations, putting in a furnace, wooden shafts and removing portions of the floors and roof, which was done without the consent of the insurer. *Held*, That there was a violation of the terms of the policy and that the insurer was not liable.—*Mack v. The Rochester German Ins. Co.*, 166.
6. In an action upon a fire insurance policy where plaintiff got title as assignee of the insured for benefit of creditors and it appeared that the acknowledgement to the consent of the assignee to become such was defective, *Held*, That this would not prevent a recovery against defendant.—*Jones v. The Howard Ins. Co.*, 167.
7. Violation of a condition in a policy requiring kerosene lamps to be filled in the day time does not make the policy void, but relieves the company from liability caused thereby.—*Id.*
8. Where proofs of loss are retained forty-five days before objection made, any objections thereto will be deemed to have been waived.—*Id.*
9. A policy of insurance was issued by defendant to plaintiff on the oil works of E. & Co. to protect royalties payable by that firm to plaintiff for certain patents, and which were guaranteed to amount to \$250 a month. The policy provided that if the premises were damaged by fire so as to cause a diminution of the royalties defendant would make good such diminution. E. & Co. had an exclusive license to use the patents. *Held*, That the policy insured the whole of the royalties, and not merely the guaranteed portion, and was not void as a wager contract.—*The National Filtering Oil Co. v. The Citizen's Ins. Co.*, 232.
10. Such an interest in property connected with its safety and situation as will cause the assured to sustain a direct loss from its destruction is an insurable interest, although he has no interest, legal or equitable, in the premises themselves.—*Id.*

11. A mere dissolution of a copartnership prior to a loss by fire, but without any actual transfer of the interest of the retiring partner to the other until after the fire occurred, is not equivalent to a change or transfer of the title to the property insured, or any interest therein, within the meaning of a policy of insurance. Besides, a transfer by one member of a firm to another is not such an alienation of title or transfer by interest in the property insured.—*Roby v. The American Central Ins. Co.*, 380.
12. The carrying on of business in a corporate name by the individual insured is no defense to the insurer.—*Id.*
13. An opinion expressed in the proofs of loss as to the origin of the fire does not preclude the insured from showing the contrary.—*Id.*
14. The question, whether the fact of alterations and additions being made in and about machinery and the employment of workmen in the building increases the risk of fire, is not a matter of expert testimony.—*Id.*
15. An expert who never saw the exhaust fan in operation, but merely examined it after the fire, cannot testify as to whether it increased the risk of fire.—*Id.*
16. Where a mortgagee insures the mortgaged premises for his own benefit, and at his own expense, and after a loss occurs discharges the mortgagor from all liability upon his bond and mortgage, upon receiving conveyance of the premises, and thus destroys the right of the insurer to be subrogated to the bond and mortgage, his right to recover upon the policy of insurance is defeated.—*Thomas v. The Montauk Fire Ins. Co.*, 555.
17. An action of foreclosure was discontinued by stipulation, plaintiff's attorney giving to defendant's attorney a receipt for the money, etc., containing the words: "this action to be discontinued and the bond in suit surrendered." Some time afterward the bond and mortgage were delivered to defendant's attorney, with an endorsement upon the bond: "Received, etc., in full of the within bond, etc., and the same is hereby surrendered and cancelled. But the insurance procured by E. L. Thomas * * * and any sum he may collect upon the same, is not affected by this surrender, but are and remain his property." The testimony was conflicting as to whether it was understood and agreed, at the time of the settlement, that plaintiff should retain or reserve the right to the insurance policy; but the court, relying upon the endorsement upon the bond, directed a verdict for plaintiff. *Held*, That the

question should have been submitted to the jury.—*Id.*

See AGENCY, 1; ATTACHMENT, 2.

FIREMEN.

See REMOVAL, 1, 2.

FISHERY.

1. A mandamus cannot be made to do a prohibitory or reviewing duty.—*Abrams v. Town Auditors*, 385.
2. The prohibition in Chap. 689, Laws of 1871, against granting a license for grounds already planted means land legally planted.—*Id.*
3. Where it appears that the applicant for a license had a former license for one year, but continued to occupy for several years without paying or intending to pay a license fee, the board is justified in refusing his application, but may grant a license to another, he being a trespasser.—*Id.*

FORECLOSURE.

See APPEAL, 5; CORPORATIONS, 8; MORTGAGE, 2-4, 7, 9-14.

FORGERY.

1. On a trial for forgery in procuring the discount of a note knowing the names of maker and indorser were those of fictitious persons, but representing them to be those of living persons and stating their places of residence, it is competent for a witness who has made search for such persons about the locality of their supposed residences to tell the means he took to find them and the results.—*The People v. Jones*, 232.
2. Although evidence which is improper has been received, yet it will not afford ground for an exception if it was not responsive to the questions put; in such case the party affected thereby should move to strike it out.—*Id.*

FRAUD.

1. One who receives a draft from a fraudulent holder on account of a precedent debt is not a bona fide holder or owner for value, and such draft is subject to any defense in his hands which could have been made to it in the hands of the fraudulent holder.—*The Rochester Printing Co. v. Loomis et al.*, 101.
2. The relation between a banker and his customers is in some degree confidential, and it must be assumed that the banker

- understands that they make deposits with him upon the faith and reliance that he is financially able to pay their drafts upon him to the amount of their deposits; and the relations he assumes, in view of the nature of his business, is in practical effect a representation on his part that he is able to do so; and if he knows or has reason to believe that he is in a condition of irretrievable insolvency, so that he could not meet his engagements, when he takes the funds of his customers, deposited to be placed to their credit, the transaction may involve an implied representation or concealment which characterizes it as fraudulent on the part of the banker.—*Id.*
3. In this action the defense of fraud did not necessarily depend upon representations made by the banker to defendants in respect to his financial ability, but fraud might be implied from the relation he assumed by means of which an invitation was extended alike to them and others to open an account with him.—*Id.*
 4. In a defense for fraud deception is necessary, but in view of the evidence and the charge as made, the court was not required to further charge specifically that the defendants must have been deceived.—*Id.*
 5. A man cannot honestly carry on the banking business and relieve himself of the imputation of inexcusable deception by reliance upon a mere promise of another to carry him, without some security for the performance of the promise. His expectation, to afford an excuse, must be based on some right of property, or in some legal duty furnishing in a reasonable degree the right to suppose his wants will be supplied, or that his demands could be enforced.—*Id.*
 6. An agreement by an assignee on a sale of real estate to hold the money paid by the purchaser until certain claims against his title were settled and to return it if it turned out that he had no title is not within the statute of frauds nor merged in the deed, and an action may be maintained on it.—*Clark v. Post et al.*, 190.
 7. Where a party defrauded, at the time of discovery of the fraud, is neither an idiot nor lunatic, but with legal capacity to act and sufficient ability to understand, the statute of limitations begins to run against him irrespective of the degree of intelligence possessed by him and whether he has enough courage and independence to resist hostile influence and assert his right or not.—*Piper v. Hoard*, 366.
 8. The withdrawal of an action for such fraud and a new settlement which is also found to be fraudulent may give a new right of action, but does not suspend the existence of the old one.—*Id.*
 9. An allegation that the cause of action did not accrue within six years before the commencement of the action is a sufficient plea of the statute.—*Id.*
 10. One F. had property left him, which on his death without issue would go to his brother. He conveyed his property to defendant, who thereafter brought about the marriage of F. with plaintiff's mother on the representation that F. had a fine property left him which would go to his heir in case he married and had one. Plaintiff is the only child of that marriage. *Held*, That there was sufficient privity between the parties to sustain an action to declare plaintiff the owner of the property and place her in possession; that defendant, as trustee *ex maleficio*, should be compelled to make the thing good to plaintiff.—*Piper v. Hoard*, 301.
 11. One Z. sold out his interest in a partnership to defendant's wife, she agreeing to pay the debts and release him. In an action by creditors of the firm Z. testified that defendant said he should be relieved from all indebtedness and that he "would see that the creditors were paid." *Held*, That the burden was on plaintiffs to show that defendant agreed for himself to be personally bound to pay the firm debts; that as the sale was not made to him and no consideration passed to him plaintiffs could not enforce such agreement, if made, against him, and that the alleged agreement not being in writing was invalid under the statute of frauds.—*Berry et al. v. Brown*, 353.
 12. A husband being utterly insolvent to the knowledge of the wife conveyed to her a farm and also executed to her a chattel mortgage as security for money loaned, the debt exceeding the value of the whole property, with intent to give her a preference over other creditors, and in pursuance of a written agreement made long prior thereto to give her security. *Held*, That the referee was warranted in finding from the evidence that the conveyance was not made with a fraudulent intent to cheat, hinder or delay creditors, and that the wife was not a party to any such fraudulent scheme.—*Doty v. Clint*, 361.
 13. The debt to the wife being an honest one, the husband had a right to prefer her, and there being no fraudulent intent on her part, she should be protected.—*Id.*
 14. The conveyance being given for a just debt, is not rendered fraudulent by in-

cluding interest not collectible at law.—*Id.*

15. Where there has been a completed contract of employment for one year between the parties, though void under the Statute of Frauds, as not being in writing, and not to be performed within one year from the time it was made, and the employee continued with the employer in the same capacity, and at the same wages, without any new employment, a new hiring at the same terms for the ensuing year will be implied.—*Hodge v. Newton et al.*, 478.

See CREDITOR'S ACTION, 3-6; DIVORCE, 2.

GIFT.

1. Plaintiff held stock of defendant which he surrendered and had transferred to his three children, and took certificates which he kept in his safe. *Held*, That plaintiff could not rescind such transfer; that defendant was not restored to its original position, but was left subject to a claim by the infants that the stock was theirs and to litigation.—*Francis v. The N. Y. & B. Elevated R.R. Co.*, 495.
2. He who would rescind must do so wholly and leave no right flowing from him outstanding which imperils the completeness of the rescission.—*Id.*
3. Plaintiff's intestate executed and duly acknowledged an assignment, reciting a consideration of a policy of insurance upon his life to the defendant, but reserving therein a power of revocation, and delivered it together with the policy to his attorney, with directions "to put them in his safe for Mrs. Guile, that it was hers, and if anything happened to him to give it to her," saying that she had been in his family and had done so much for him that he was going to give it to her. *Held*, A valid gift *in presenti*; that there was a delivery of the instruments to the attorneys for the donee, subject to the right of revocation during the donor's lifetime.—*Williams v. Guile*, 565.
4. Where the complaint admits that plaintiff's testator executed an assignment of the instrument claimed by the executor to defendant, but denied its delivery, it is not necessary to allege affirmatively the title by assignment and delivery, the allegation of non-delivery being denied.—*Id.*

See LIFE INSURANCE, 6.

GUARANTY.

1. The construction of a guaranty of payment is largely influenced by its pre-

cise language viewed in the light of the circumstances attending its execution.—*Schwartz et al. v. Hyman*, 585.

2. A letter requesting the sending to a third party of a line of samples suitable for spring and summer and stating that the writer will guarantee payment of any goods that may be sold him is not a continuing guaranty.—*Id.*

GUARDIANS.

1. A general guardian, although he gave security upon qualifying as such, must give another bond as required by § 2746 of the Code before he can obtain possession of his ward's estate.—*In re estate of Flagg*, 151.
2. The provisions of a will and codicil construed upon facts stated.—*Id.*
3. The fact that the name of the guardian was suggested by the petitioner does not render the appointment invalid.—*In re estate of Vandewater*, 814.
4. It is not necessary that a relative of the infant be appointed guardian; but in many cases such appointment would be improper by reason of adverse interest.—*Id.*
5. The exercise of the discretion of the surrogate in selecting a proper person as guardian is not reviewable so long as no legal disqualification seems to exist in the appointee.—*Id.*

See STAY.

HABEAS CORPUS.

1. Relator was imprisoned for contempt for non-payment of alimony. He had been held under previous commitments for the same offense, applications to discharge from which were denied, and new commitments issued to correct irregularities. *Held*, That he was not entitled to a discharge under § 205.—*The People ex rel. Clark v. Grant et al.*, 289.
2. Where an order in contempt proceedings indicates precisely the moneys to be paid to obtain a discharge an omission to specify a formal fine will not entitle the party in contempt to a discharge.—*Id.*
3. A party in contempt for non-payment of alimony is not subject to imprisonment for non-payment of the referee's fees, but he is not entitled to discharge because they have been included in the amount directed to be paid.—*Id.*

HIGHWAYS.

1. The title to land was in N. for convenience, it being owned by V. and N.

- With the consent of N. a contract was made by V. with B. to sell it, the price to be paid in installments. B. paid part and went into possession. He then verbally sold to plaintiff a right to a private road. On the application of B. and plaintiff this was laid out by the commissioners of highways. B. then sold his rights to defendant who had full knowledge of plaintiff's claim. Thereafter defendant paid up in full to V. and N. and received a deed. Defendant blockaded the road. *Held*, That plaintiff was entitled to a perpetual injunction restraining defendant.—*Benedict v. Calkins*, 248.
2. Plaintiff was a resident of the town of O. and lived upon a farm a portion of which was situated in the adjoining town of N., but was assessed in respect to the whole farm in the place of his residence. In 1885, the commissioners of highways of O. in apportioning the amount of highway labor chargeable against him, followed the last assessment roll of the town, and included that portion of his farm lying in the town of N. *Held*, That as the whole farm was borne upon the last assessment roll of the town of O, it was the duty of the commissioners in making their apportionment of highway labor to follow that roll and to assess plaintiff accordingly thereto.—*Hampton v. Hamsher*, 346.
 3. In an action against a town for injuries alleged to have been caused by defects in a highway, the court charged the jury that it was the duty of the town, in its corporate capacity, to keep and maintain the highways within the town in a reasonably safe and secure condition and to provide the funds necessary for that purpose, not exceeding in amount the sum authorized by law to be raised for that purpose. *Held*, Error.—*Rhines v. The Town of Royalton*, 412.
 4. A complaint against a town for damages occasioned by a defective highway, so far as it alleges negligence of the town, its agents and assistants, fails to allege a cause of action. No duty rests upon a town to maintain the highways within its limits; the statute confers upon them no power or duty in respect to defective highways, but the supervision remains with the commissioners, and it is their negligence which gives a right of action.—*Farman v. The Town of Ellington*, 443.
 5. Ordinarily when the commissioner has been advised of the defective condition of a highway, the reparation of which is within the means at the command of the overseer, having given the direction to the latter to repair it, he may for the time rely upon the performance by him of such duty, yet he should be required to use diligence to learn whether the overseer has proceeded with the work, and if he has not, to use the means provided to enforce the execution of his direction.—*Id.*
 6. As it does not appear that the commissioner took any means to ascertain whether his communication to the overseer reached him or not, or whether or not any steps had been taken to repair the road prior to the accident, under the circumstances of this case there was sufficient evidence to send the case to the jury, and it is not important whether the question of negligence did not depend upon evidence given after plaintiff had rested and the motion for a nonsuit had been denied.—*Id.*
 7. A charge by the court that it did not wish to be understood that it was the duty of the commissioner to look further after direction to the overseer, but it was a question for the jury to determine whether or not he had discharged his whole duty under the circumstances, and that if such directions were communicated to the overseer it was his duty to repair, and his neglect to do it not coming to the knowledge of the commissioner does not impute negligence to the latter, was as favorable to defendant as it was entitled to.—*Id.*
 8. None of the proceedings taken upon an application to lay out or alter a highway to the commissioner of highways preceding an appeal are brought before the court on a writ of *certiorari* directed to the referees only, to review an order made by referees reversing the decision of the commissioner of highways.—*The People ex rel. Stockwell v. Newgrass et al.*, 513.
 9. The statutory notice given to the commissioner of the hearing before the referees gives jurisdiction to the referees to proceed with the hearing, and the notice to the occupants contemplated by the statute may follow the reversal of the order of the commissioner, but the referees cannot make the determination to lay out or alter a highway without notice to the occupant, and if they do so in that respect their action will be without jurisdiction, and if such omission appears by the record the determination of the referees cannot stand, but if not, this objection is not available to the relator.—*Id.*
 10. In an action against a town for damages for an injury alleged to have been caused by the negligence of the commissioners of highways, although it cannot be held as a matter of law that the commis-

sioners were free from negligence, but on the contrary they were guilty of negligence in some respect, this does not charge the town with liability unless it is seen that such negligence caused the injury in question.—*Stacey v. The Town of Phelps*, 547.

11. The burden of proof is with the plaintiff to establish not only that the commissioners were chargeable with negligence, but that if they had not failed to perform their duty the injury would not have been sustained. This fact cannot rest in mere conjecture or speculation but must be founded on evidence.—*Id.*

12. The commissioners are required to use reasonable care for the safety of the traveling public in reference to the situation, but this does not impose upon them the duty to erect a barrier when engaged in the lawful repairs of the highways against the fury of a team of horses running away.—*Id.*

13. When a highway has become dangerous without the fault of the commissioners it is the duty of such commissioners to warn persons traveling upon the highway of such dangers.—*Id.*

14. The warning required to protect a traveler is not such as would necessarily stop a runaway team, but this matter of warning has no application to an injury received by reason of a defect in the highway occasioned or continued by the negligence of the commissioners.—*Id.*

See ASSESSMENTS, 5; CONVERSION, 4; DEEDS, 1, 2; RAILROADS, 26.

HUSBAND AND WIFE.

1. An agreement between husband and wife providing that upon the payment by the former to the latter of a certain sum, which should be received by her in lieu of all her dower right, etc., in his property, they should thenceforward live apart is not void as against public policy when at the time of making such agreement the parties were living separate and apart and an action for separation upon the ground of cruel and inhuman treatment was pending between them.—*Pettit v. Pettit*, 574.

See FRAUD, 12-14.

INDICTMENT.

See LARCENY, 4, 7; PERJURY, 2, 3.

INFANTS.

1. One who claims under a sale of infant's real estate is bound to establish by affirmative evidence that every requirement of

the statute necessary to confer jurisdiction on the court to order a sale has been complied with.—*Elwood et al. v. Northrup*, 76.

2. A county judge has no power to act in a matter relating to the care, custody or control of infants. His powers to perform the duties of a justice of the Supreme Court at chambers are purely statutory; and the general equity jurisdiction which is possessed by justices of the Supreme Court does not attach in any way to a county judge or to his acts.—*The People ex rel. Williams v. Corey*, 504.

See GUARDIANS; STAY; VAGRANTS.

INJUNCTION.

1. Upon a motion for an injunction *pendente lite* the verified pleadings may be treated as affidavits, and effect given to them as affidavits only. And where all of the material allegations of the complaint are positive and direct, and made and verified upon the personal knowledge of the affiant, and the denials and averments of the answer are made only upon information and belief, the answer is insufficient, as an affidavit, to put in issue the facts alleged in the complaint.—*The R. & O. T. R. Co. v. The City of Rochester*, 392.

2. There are cases when a party will be denied the right to an injunction when it appears that by reason of gross laches, or delay in applying for the restraining mandate, large expenses have been incurred and great loss or injury would result to the party who has thus been permitted to proceed without interruption when such party has proceeded in good faith founded upon a belief of his right to so proceed.—*Vick et al. v. The City of Rochester*, 492.

3. When interests are involved concerning the public, if it appears that the defendant has taken any steps to acquire the right to do that which is sought to be restrained, and which would probably result in acquiring such right, some reason would appear for the denial of an injunction, or of suspending its operation for a reasonable time.—*Id.*

4. The provisions of § 805, Code Civ. Pro., do not apply to local officers in the performance of a duty imposed on them by the order of the governor of the State directing them to abate a nuisance, and in such performance neither the order nor the statute confer the right to impose a burden upon lands of another without acquiring the right to do so in the manner provided by law.—*Id.*

See CONTRACT, 9; CONVERSION, 5; DEEDS, 9; EXCISE; FERRIES; HIGHWAYS, 1; RAILROADS, 27.

INTEREST.

1. In an action upon a judgment interest is given, not upon the principle of implied contract, but as damages for delay in performing the obligation, and only the lawful rate can be recovered.—*Wells, Fargo & Co. v. Davy*, 34.

See SERVICES, 2.

INTERPLEADER.

1. A deposit was made with defendant by one N. as trustee. After his death actions to recover the fund were brought by his executrix and by one claiming to be beneficially entitled to the fund. *Held*, That an interpleader was proper.—*Norton v. The Union Trust Co.*, 23.

See PRACTICE, 7.

JUDGMENT.

1. A bankrupt is not bound to procure a stay of proceedings pending in the State courts.—*The West Philadelphia Bank v. Gerry*, 129.
2. The decision of the Supreme Court on the question of laches is not reviewable by the Court of Appeals.—*Id.*
3. On an application by a member of a partnership for a discharge from his debts a partnership debt could be proved whether there were partnership assets or not, and he would be entitled to be discharged therefrom.—*Id.*
4. For the purposes of § 1268 of the Code a judgment is regarded as the old debt in a new form and a discharge of the cause of action discharges the judgment.—*Id.*
5. The jurisdiction of inferior courts, dependent as they are upon the statute for authority, will not be presumed, but must appear to support their judicial action.—*Agar et al. v. Tibbets et al.*, 418.
6. By the force of the statute and within its provisions and purposes, providing for the filing with the county clerk transcripts of judgments rendered by a justice of the peace and docketing such judgments, transcripts of such judgments failing to show jurisdiction are *prima facie* sufficient evidence of judgments to authorize the clerk to issue execution, and to support the title of purchasers on execution sale.—*Id.*
7. When the creditor seeks to make his judgment the subject of another action he proceeds to charge the judgment debtor for a debt evidenced by his judgment; and whether it was a judgment or not before the transcript was filed and the entry by the clerk depends upon the fact of juris-

diction of the Justice's Court which rendered the judgment, and unless the transcript filed shows such jurisdiction it is not sufficient evidence, even *prima facie*, to support a judgment.—*Id.*

8. Where the affidavit attached to an offer of judgment which defendant's attorney is authorized to make is made by the managing clerk of defendant's attorneys, and such offer is accepted by the attorneys of plaintiff, which acceptance is properly verified, and a judgment is entered upon such offer and acceptance, the failure of defendant's attorney to make and attach the required affidavit to the offer of judgment is an irregularity which plaintiff may waive, and such acceptance and entry of judgment is a waiver, and the validity of the judgment cannot be attacked by a third party. The record of the judgment may be amended on motion *nunc pro tunc*.—*The Citizen's Nat. Bk. v. Shaw*, 505.

9. The question whether or not a judgment is fraudulent against creditors of defendant cannot be properly raised and determined on motion; the remedy for relief upon that ground, if it exist, must be by action.—*Id.*

10. After the expiration of the term of six years after the rendition of a judgment of a Justice's Court, the right of the judgment creditor to avail himself of the statute of limitations as a bar becomes a vested right, which cannot be defeated by legislation, and he cannot be divested of that right by the filing of a transcript and docketing the judgment, and in view of § 414 of the Code of Civ. Pro. no reason appears why such bar may not be effectually asserted in any proceeding taken upon a judgment so docketed.—*Davison et al. v. Horn*, 558.

See APPEAL, 1, 2; ATTACHMENT, 3; BAR, 1; CORPORATIONS, 5; DIVORCE, 2, 5; INTEREST; LIMITATION, 1-3; PLEADING, 5.

JUDICIAL SALES.

1. Whether a requirement in the terms of sale that the purchaser should pay twenty-five per cent. on his bid at the sale instead of ten was so unreasonable as to justify an order for a resale depends on all the surrounding circumstances.—*Tabor v. Brundage*, 194.
2. Circumstances sufficient to require such payment.—*Id.*

See INFANTS, 1.

JURISDICTION.

1. The provision of § 993, Chap 410, Laws of 1832, which enacts that the city may pay the award into the Supreme Court.

was for the benefit of the city which may adopt it as a defense to an action brought in another court but is not obliged to do so. A party interpleaded by it cannot rely upon such provision to attack the jurisdiction of the court So held, where the action was brought in the Superior Court —*Pollock v. Morris*, 3.

2. The courts of this State have jurisdiction of controversies between residents of other States arising out of torts—*e. g.*, crim. con—committed there, even though the defendant was served while but casually within the State and about to depart therefrom; but the court may, in the exercise of a sound discretion depending upon the facts and circumstances of the particular case, refuse to entertain actions of that character.—*Burdick v. Freeman*, 318
3. But the trial court should be distinctly called upon, as soon as practicable in the course of the trial, to exercise such discretion in order to present the question for review on appeal.—*Id.*
4. A mere request to charge the jury that plaintiff cannot maintain his action in the courts of this State is not sufficient to present the question whether the trial court, in the exercise of the discretion vested in it, should have refused to take cognizance of the case.—*Id.*

See APPEAL, 4; ASSIGNMENT FOR CREDITORS, 8; BANKRUPTCY, 1; BANKS, 2; CONTRACT, 9; CRIMINAL LAW, 1; DIVORCE, 5; EXECUTORS, 5, 7; JUDGMENT, 5; RAILROADS, 2, 12; VAGRANTS, 3; WILLS, 5.

JURORS.

1. The mere fact that a person has been subpoenaed as a witness does not disqualify him as a juror, and there is no reason for the disclosure of that fact on his examination as to his state of mind on the merits.—*Rankin v. Nelson*, 348.

See CRIMINAL LAW, 6.

JUSTICE'S COURT.

1. Parties have the right to appear by attorneys in Justice's Courts, authorized to manage and control the conduct of suits; and when they do so appear the stipulations of such attorneys bind their principals —*The Village of Suspension Bridge v. Bedford*, 423.

See APPEAL, 4; EXECUTION, 6; JUDGMENT, 6, 7, 10; PENALTIES.

LACHES.

See JUDGMENT, 2.

LANDLORD AND TENANT.

See LEASE.

LARCENY.

1. Upon an indictment for larceny in obtaining goods by means of a false representation or pretense, evidence of other similar transactions at or about the same time is competent, as bearing upon the question of intent. Letters written by the prisoner to other dealers, and their replies thereto, and the procuring of the goods by means thereof, are admissible for such purpose; but letters written long after the transaction has taken place are not admissible for any purpose.—*The People v. Luke*, 51.
2. A letter written by the prosecutor to the prisoner some time after the obtaining of the goods charged in the indictment, and accusing him of bad faith and of avoiding payment, is not admissible; it is merely the written declaration of the prosecutor, and is no part of the *res gestæ*.—*Id.*
3. A letter written by another dealer to the prisoner, about a year previous to the commission of the offense charged, accusing him of having swindled the writer out of the price of potatoes, etc., is no part of the *res gestæ*, and is no evidence to show that defendant ordered the potatoes, that the order had been filled, and the price not paid.—*Id.*
4. Where upon a trial for larceny there is a variance between the allegation and proof as to the owner of the goods alleged to have been stolen the indictment may be amended in that respect. The name of the owner is no material attribute of the crime charged.—*The People v. Herman*, 118.
5. Section 298, Code Crim. Pro, allowing such amendment, is not unconstitutional.—*Id.*
6. To sustain an indictment for feloniously stealing, taking and carrying away certain goods there must be proof of a taking against the will of the owner; proof that the goods were obtained by means of false representations and a false writing is not sufficient.—*The People v. Du-mar*, 220.
7. The indictment must state the crime and the act constituting it; if either one of several acts constitutes the crime, the several acts must be separately stated in different counts.—*Id.*
8. The crime of larceny charged depended on the criminal intent for its support, and if the evidence failed to give that quality to the act of defendant in appropriat-

ing the check he was improperly convicted. If the appropriation at the time it was made was not characterized by the purpose of defendant to deprive or defraud the true owner of it, the offense was not committed.—*The People v. Bradner*, 447.

9. Ordinarily the possession of negotiable paper is *prima facie* evidence of title in the possessor, but the presumption does not necessarily arise as between a bank and its officers and managers that commercial paper left and found in the bank is the property of the bank.—*Id.*

10. If the evidence justified the conclusion that defendant knew that this check was not the property of the bank, and that his purpose was to take it and appropriate its proceeds to his own use the jury were permitted to conclude that he intended the consequences of the act, which was to deprive the true owner of the property. This is the requisite criminal intent of a person standing in respect to the property taken in the fiduciary relation of bailee, servant, agent, clerk or trustee, and this was the relation of defendant to the property taken.—*Id.*

LEASE.

1. The lessor's covenant to repair is independent of the lessee's covenant to pay the rent, and the fulfillment thereof is not a condition precedent to the obligation of the lessee, but the damages resulting from a breach of the covenant may be set up as a counterclaim in an action for the rent.—*Newman v. French et al.*, 38.

2. Where the power furnished under a lease of premises with steam power is insufficient or irregular and unfit for the use of the lessee's machinery, to the latter's knowledge, he has no right to make damages by its attempted use.—*The Manhattan Stamping Works v. Koehler*, 196.

3. Profits to arise from a continuation of the lessee's business and loss of work by his workmen are too remote and uncertain to constitute damages in such a case.—*Id.*

4. The ordinary rent of the machinery during the time of the deficiency of power is a proper item of damage, but in the absence of allegations in the complaint claiming damages on that ground evidence thereof is irrelevant.—*Id.*

5. A lease contained a covenant for renewal upon the lessee giving "two monthly notices" to that effect. *Held*, That a notice served more than two months prior to the termination of the lease was sufficient; that two notices were not essential.—*Kolasky v. Michels*, 252.

6. The action was defended on the ground that the lease was procured by means of false representations made by the original lessee, who was dead at the time of the trial. *Held*, That proof of such representations was inadmissible under § 829.—*Id.*

7. In the absence of a specific provision in a lease to that effect, an agreement therein contained to pay the value of the buildings and improvements at the end of the term merely renders the lessors liable to a money judgment therefor, and creates no lien on the land.—*The N. Y. Dyeing & P. Estab. v. De Westenbery et al.*, 290.

8. When a lease is executed in counterparts, by one of which the house is to be let "to be furnished substantially as it now is," and by the other "to be furnished as it now is," the word "substantially" will be implied in the latter.—*Edwards v. McLean*, 393.

9. That the house let was infected when the term began is no defense to action for rent, it appearing that the infection occurred after the lease was made, without the landlord's fault, and there being no special covenant by him.—*Id.*

10. Declarations or admissions made by a lessee after the termination of the lease in an action for the rent are not competent evidence against his surety on the lease.—*Ayer et al. v. Getty*, 342.

11. A farm lease provided that all the personal property and crops raised and to be raised on the land should be bound to the landlord as security, and that the landlord shall have the title to the property raised or produced or kept on the farm and right of possession at any time. The lease was properly filed as a chattel mortgage. *Held*, That the instrument was valid so as to create a lien as against a purchaser of crops raised on the farm without actual notice of said lien.—*Smith v. Taber*, 379.

12. Certain premises were let for one year to defendants as a bonded warehouse, defendants covenanting to pay the rent for the term and also for such further time as they may hold the same. At the close of the term there were goods in the warehouse which could not be removed without the consent of the government, but when such consent was obtained it was locked and the keys left at a place directed by plaintiff. There was evidence of a surrender at the close of the term. *Held*, That the holding over was on the covenant only, and did not constitute a holding over so as to render defendants liable for rent a second year.—*Pickett v. Bartlett et al.*, 396.

See DEEDS, 3; FERRIES, 4; MORTGAGE, 1; PARTITION, 1; RAILROADS, 19.

LEGACIES.

1. In case the testator's estate is insufficient to pay all the legacies in full they must abate *pro rata* in the absence of any provision of the will showing an intention on the part of the testator to give one legatee preference or priority over the others.—*In re estate of Morris*, 161.
2. Where at the time of making the will testator had ample personal estate to satisfy all legacies mentioned, no intention can be inferred of making payment of the legacies a charge on the real estate, although he may afterward have invested his personalty in real estate and there is a general residuary clause.—*Schnorr et al. v. Schroder et al.*, 170.

See WILLS, 16.

LIEN.

See ATTORNEYS, 2; CHATTEL MORTGAGE, 4; LEASE, 7, 11; WILLS, 23.

LIFE INSURANCE.

1. The provisions of a life policy requiring a prompt payment of the stipulated periodical payments is a condition precedent, but such prompt payment may be waived by the insurer, and in such case the contract remains in full force.—*Baker v. The N. Y. State Mut. Ben. Assn.*, 91.
2. When the application for insurance contains a provision that the contract will become null and void on default of payment and also contains an agreement to pay all dues and assessments until the "member" shall give notice of withdrawal and makes reference to the by-laws, which require compliance with the stipulations of the application and provide that the "Member shall be held liable to the association for all dues and assessments until he shall have given notice of his desire to withdraw," and further provides in case of default "Such membership shall cease and determine at once without notice, and all claims shall be forfeited to the association," it seems that it leaves it optional with the "association" to terminate or treat as terminated the relation of a "member" of one who is in default, or to continue his relation and charge him with liability to pay dues and assessments until he gives notice of his withdrawal.—*Id.*
3. Respondent issued an application and certificate of membership which provided that for it to be held the member must have sustained bodily injuries effected through external, violent and accidental means and that such injuries alone should have caused death; also that

there must be an external and visible sign of such injuries; also that it was not to be liable for death by disease or by poison in any form or manner. The deceased died of malignant pustule which is caused by the deposition by flies or otherwise of putrid matter, found on cattle and hides, upon thin or abraded skin. He had been employed in a meat market and at a station where cattle and hides were shipped. There was no direct evidence of how the pustule was caused. Held, That a nonsuit was error.—*Bacon v. The U. S. Mut. Accident Assn.*, 156.

4. Chapter 841, Laws of 1876, prohibiting the forfeiture of policies unless thirty days' notice is previously served, applies to policies issued before but which have been renewed after the passage of said act.—*Wyman v. The Phoenix Mut. Life Ins. Co.*, 206.
5. Where the agent of the insurer draws up the application and inserts the answers at his own suggestion, the insured stating that he does not know the facts called for by the interrogatory, the insurer is estopped from setting up the falsity of the answer in avoidance of the policy.—*Miller v. The Phoenix Mut. Life Ins. Co.*, 469.
- 6 A policy of life insurance may be transferred by gift, though not witnessed by any written transfer, by an unqualified delivery thereof to the donee with the intent to vest the absolute title.—*In re settlement of Babcock et al.*, 529.

See EVIDENCE, 6; GIFT, 3; PRACTICE, 7.

LIMITATION.

1. Where a claim on a judgment is barred by the statute when presented no acknowledgment or new promise by an administrator is available to revive the debt against the other creditors or next of kin. *In re accounting of Kendrick*, 320.
2. The extension of eighteen months mentioned in § 508 does not apply to judgments.—*Id.*
3. A statement of the claim in the administrator's account accompanied by a statement that it is disputed is not an acknowledgment of the debt. Nor is an admission thereof in answer to a claim by a stranger sufficient to rebut the presumption of payment.—*Id.*
4. When one person delivers to another orders on a third person to pay money to the one to whom they are given when certain work has been performed, such orders constitute an acknowledgment in writing of the debt within the statute of limitations and continue the debt for six years from their date.—*Manchester et al. v. Braender*, 327.

5. When the party giving such orders by his own act in abandoning the work prevents the payment of the orders he thereby leaves himself subject to the obligation of paying the debt.—*Id.*
6. When one receives money in his own right and is afterward by evidence or construction changed into a trustee he may insist on the same lapse of time as a bar.—*Price v. Mulford*, 838.
7. In an action for money had and received, fraud not being the ground of action, the statute of limitations is a perfect defense, although the fund was received under circumstances implying a trust.—*Id.*
8. A letter written and sent by the debtor to his creditor, acknowledging the debt, and promising to pay the same "as soon as I possibly can," is sufficient under Code § 895, to take the claim out of the statute of limitations; this though the letter be sent prior to the expiration of the six years' limitation.—*Allen v. Trisdorfer*, 578.

See CORPORATIONS, 9; DURESS, 2; EXECUTORS, 6; FRAUD, 7-9; PLEADING, 1, 3.

LUNACY.

See EVIDENCE, 12-14; WILLS, 21.

MANDAMUS.

1. The granting or refusing of a writ of mandamus, especially when it is asked against public officers to compel the performance of an alleged public duty, is somewhat a matter of discretion.—*The People ex rel. McMackin et al. v. Board of Police*, 340.
2. Where there were three different bodies each claiming to be the sole representative of the party entitled to the appointment of additional inspectors of election, *Held*. That as there were disputed questions of fact an application for a mandamus to compel the appointment of inspectors from one of said bodies should not be granted.—*Id.*

See FISHERY, 1; SUPERVISORS, 1, 3.

MARINE COLLISION.

1. In an action for damages caused by negligence resulting from a collision of vessels, it is competent to prove that there were means and facilities known to those running vessels which were usual, and which would enable the jury to find furnished a greater degree of safety to the vessel injured than the means used.—*Case v. Drew*, 451.

2. Where the specific objection to a question is that the foundation had not been laid for the question, and the attention of the court is not called to the competency of the inquiry in the form it is put to the witness the question of competency is not available upon appeal.—*Id.*

3. A mariner as a witness may give his opinion based upon his knowledge obtained by observation of the distance a described light might be seen in a given position by a person in another given position when free from obstruction, but the value of the opinion when given is for the jury to determine.—*Id.*

4. An almanac as such is not evidence of the time the moon rose on a given day; yet the court will take judicial notice of the time the moon rose on the different days of the year as of all other events in the constant and immovable course of nature, and it may be assumed that the court in admitting the almanac as evidence of the time the moon rose treated it as correctly stating the time on the day in question, and admitted it for the purpose of refreshing the memory of the jury, and in such view it is competent.—*Id.*

5. While the omission of plaintiff to have on his boat the light prescribed by the ordinance of the city of Buffalo was a fact for the consideration of the jury on the question of the plaintiff's negligence it did not necessarily establish that fact for the purpose of a defense.—*Id.*

MARRIAGE.

1. To constitute matrimonial cohabitation, the manner in which the parties are living together must be such as to fairly represent such relation, but the fact that the man kept rooms in his own house which he occupied a portion of the time, and away from the residence of the woman is a circumstance bearing upon the situation, but not necessarily inconsistent with matrimonial cohabitation.—*Wilcox v. Wilcox et al.*, 458.
2. The fact when found of a contract and formal ceremony attending it is significant of the then purpose of the man and woman to assume the relation of husband and wife to each other and goes to characterize their association following it as lawful and marital if it takes the character of cohabitation, and may not in the judgment of the jury require so much by the way of appearances, reputation and publicity as would be deemed necessary to produce the inference of a contract of marriage when no other evidence of it than cohabitation is made to appear.—*Id.*

3. When a marriage is void by the laws of the place where celebrated, when entered into between citizens of our country when celebrated according to the laws of their domicile while in another country, such marriage may be treated as a contract to marry *per verba de presenti* and treated as valid when followed by cohabitation, by reason of such cohabitation.—*Id.*

4. Photographs, shown to be likenesses of the person they purport to represent may be shown witnesses, for the purpose of identifying the person whose likeness they may purport to be, although not taken from the original negative.—*Id.*

5. A judgment record of another State where it does not appear that the court had jurisdiction over the defendant is not an adjudication for any purpose, and the plaintiff in such proceeding is not concluded thereby.—*Id.*

6. The presumption of innocence and freedom from purposes and conduct immoral applies in civil as well as in criminal cases, and satisfactory evidence is required to establish the contrary; and when in the judgment of the jury the evidence is *in equilibrio* the imputation is not established.—*Id.*

MARRIED WOMEN.

1. Plaintiff and her husband occupied testator's farm, working the same on shares, he living with them, and receiving her care and attention during his sickness. Testator repeatedly promised plaintiff, and also her husband, that he would pay her for her work and trouble if she would not leave the house, as she had several times threatened and prepared to do. Her husband had also told her that she might have whatever the testator should pay her. *Held*, That the facts and circumstances were sufficient to indicate an intention on the part of the wife to separate her earnings from his, and to avail herself of the right conferred by Chap. 90, Laws of 1860, to perform services on her sole and separate account; that it was a question of fact whether it was understood by the parties that the compensation was to be paid for her separate use and property, and the referee was warranted in so finding.—*Burley v. Barnhard*, 6.

2. The right or title of a married woman in a claim for services, rendered on her sole and separate account, is not derived from, through, or under her husband, and therefore he is a competent witness to testify in her favor in an action against an executor, etc.—*Id.*

3. Where property has been purchased for a married woman and she has received

the benefit thereof she is liable on a note given therefor signed by her husband in a firm name under which he and she transacted business as to her property, without regard to the question whether she could form a partnership with her husband.—*Noel et al. v. Kinney*, 58.

MASTER AND SERVANT.

1. The relation of representative, in the sense requisite to render the performance of an act of the servant that of the principal does not necessarily depend upon his rank, but upon the character of the service called upon to perform; and when an employer has organized a proper system, and made sufficient rules for the purpose of carrying it out with reasonable safety to its employees, it is sufficient that competent men are employed to conduct that system according to the established rules.—*Monaghan v. The N. Y. C. & H. R. R.R. Co.*, 85.

2. Where an engineer undertakes to operate and run a locomotive engine known to him to be defective, he takes the hazard of such known defects, and under such circumstances it cannot be said, in view of his profession and experience, that he did not appreciate the situation or conditions and inconvenience that might arise from them.—*Id.*

3. The foreman of a gang of workmen is a fellow-servant with them so far as injuries caused by his carelessness are concerned, and the master is not liable for such injuries unless the foreman was incompetent for the place and the master did not use due care in selecting him for this employment.—*Hansen v. The Trustees of the N. Y. & B. Bridge*, 190.

4. Evidence insufficient to show incompetency.—*Id.*

See NEGLIGENCE, 11; RAILROADS, 1.

MECHANICS' LIEN.

1. Under Chap. 140, Laws of 1880 (relating only to the city of Buffalo), it is not sufficient to establish a lien to show that the work has been performed or the materials furnished with the knowledge or consent of the owner of the premises, but it must be "by virtue of a contract with the owner thereof, or his agent."—*Zeigler v. Galvin*, 88.

2. The court found as facts, that husband and wife were living together upon her premises, and that, with her knowledge, consent and approval, he entered into a contract in his own name for the building of an addition to the house; that she had no separate business or income, nor did she assume or promise to pay for the

improvements. *Held*, That a conclusion of law that the husband was the wife's agent in contracting for the improvements was not warranted by the findings of fact.—*Id.*

3. Under Laws of 1885, Chap. 343, § 1, subcontractors may have a lien for materials used in the work furnished the contractor to the extent of the difference between the amount actually paid such contractor and otherwise expended to complete the work, and the contract price, though at the times the liens were filed the contractor had abandoned the contract and the owner had himself undertaken to complete.—*Larkin et al. v. McMullen et al.*, 352.

MERGER.

1. Plaintiff in 1862 was mortgagor of premises belonging to S and J. Lamb. In July, 1869, they executed two mortgages, one to plaintiff and one to Barnett. These latter mortgages were foreclosed at one time in March, 1873, and the same referee deeded half to plaintiff and half to Barnett and one Rice. The judgments in these foreclosure actions reciprocally provided that the judgment in one action should not affect any prior lien of the plaintiff in the other action. In June, 1873, plaintiff conveyed his half to one Griswold and one Keith, and by his deed stated that he conveyed the rights he acquired on the foreclosure sale and no more. Griswold and Keith knew that plaintiff intended if he could to keep his senior mortgage alive. *Held*, That plaintiff's mortgage of 1862 did not merge when he acquired title in March, 1873, and continued a lien as well upon the half of Griswold and Keith as upon the half of Barnett and Rice.—*Clements v. Griswold et al.*, 430.

See DOWER, 1; FRAUD, 6.

MORTGAGE.

1. G. & P. were the assignees of an oil lease, which required a certain number of wells to be drilled within specified times, but the lessor afterward extended the time and they agreed to put down additional wells. P. executed a mortgage to plaintiff upon his individual interest in the leasehold premises, together with all his interest in oil wells, machinery, structures, fixtures, etc., thereon, or thereafter to be placed thereon; and covenanted that he would perform all the conditions and requirements of the lease; which mortgage was duly filed. Afterward G. & P. assigned all their rights under the lease to defendants, who entered into possession and put down the wells required by the lease. *Held*, That the mortgage became a lien upon the wells,

fixtures and appliances put upon the premises by defendants in accordance with the requirements of the lease.—*Kribbs v. Alford et al.*, 53.

2. One Phelps took an assignment of a judgment of foreclosure, and paid the face of it (\$1,468). Some time thereafter the mortgagor's husband gave him a check for \$1,050 and his note for \$400 which Phelps indorsed and had discounted at the bank, but subsequently took it up. He was given security to protect him on his indorsement. Afterward, at the request of the judgment debtor and mortgagor, he assigned it to A. as security for a loan of \$1,400 made by him to said debtor. *Held*, That the court was warranted in finding from the facts and circumstances adduced in evidence that it was not the intention of the parties to satisfy, pay or extinguish the judgment, but on the contrary to keep it alive, in full force and effect; and that the purchaser at a sale thereunder acquired title.—*Carpenter v. Andrews et al.*, 66.
3. A party making an application under § 452 does not forfeit his right to be made a party and defend his title because he has omitted to record his deed, provided his application is made in due time.—*Johnston v. Donovan et al.*, 79.
4. Application to be made parties defendant in an action of foreclosure was made before answer on a petition stating that the defendant took the conveyance to himself in trust for the applicants and subsequently conveyed to one of them in trust for both, which deed was not recorded. *Held*, That a case was made out within the statute.—*Id.*
5. Where a mortgage by its terms covered after acquired property, and every acquisition of property in character like that specified, or within the terms of the mortgage, a mere valid promise or undertaking of a third party, taken for the payment of interest, to give financial support to enable the mortgagor to escape default, is not property which the mortgagee will take by force of the mortgage.—*The Metropolitan Trust Co. v. The N. Y., L. E. & W. R.R. Co.*, 121.
6. The agreement being executory on both sides, the respondent company having security for its performance, its agreement to make advances in certain events, for the protection of the property of the mortgagor, against the foreclosure of the lien of the mortgage on its property, and not being for the payment of any debt, or the interest on any debt, or in protection of any property of the respondent company, no right of action enured on such agreement to the mortgagees.—*Id.*
7. While an omission to publish an ad-

journalment of a foreclosure sale is an irregularity for which the sale may be set aside on application by a party to the suit, it is not a jurisdictional defect available to a purchaser years afterward, without objection by any of the parties.—*Bechstein v. Schultz et al.*, 141.

8. J. B. R. made his note to the order of T. R., who indorsed it for the maker's accommodation, and subsequently J. E. R. and G. H. B. successively became accommodation indorsers. J. E. R., wife of J. B. R., and owner of real estate, mortgaged it to secure G. H. B. The maker and first indorser paid the note. G. H. B. assigned the bond and mortgage and it came to plaintiff. It did not appear that plaintiff was a holder for value. *Held*, That he could not recover.—*Masten v. Reilly et al.*, 216.
9. Defendants in foreclosure contend that the consideration for the bond and mortgage was an illegal one, to wit, an agreement to prevent competition at a public sale. *Held*, as the alleged illegality was not shown by plaintiff's proof or pleaded by defendants, *quere* whether it is available as a defense. Under the circumstances of this case, *Held*, That the alleged defense was not proved.—*Hopkins v. Ensign et al.*, 229.
10. A judgment creditor derives title through his debtor within the meaning of § 829, and cannot in an action to foreclose a mortgage on the debtor's lands show by him personal transactions between him and the mortgagee, since deceased, to prove the mortgage fraudulent.—*Geissman v. Wolf et al.*, 294.
11. Where the answer admits the making and recording of the bond and mortgage, but denies delivery, proof that the mortgage was recorded is sufficient to show delivery; production of the bond is not essential.—*Id.*
12. The mortgage to plaintiff provided that if the taxes were not paid the mortgagee might pay them and the same and expenses should be a lien on the premises. Defendant purchased the premises on foreclosure of a junior mortgage, and tendered a sum in excess of the amount due on plaintiff's mortgage, but not enough to include a sum paid to a tax examiner who obtained a reduction of taxes unpaid by the mortgagor. *Held*, That the tender was not sufficient.—*The Equitable Life Ins. Co. v. Von Glahn*, 304.
13. The County Court has no jurisdiction or power in an action to foreclose a mortgage upon an undivided interest in a certain lot to reform the instrument upon the ground of an alleged mistake, so as to make it cover the whole interest in the lot, and to decree a foreclosure

and sale accordingly.—*Thomas v. Harmond et al.*, 316.

14. Plaintiff paid his bid on foreclosure and the surplus was deposited with the clerk. Defendant obtained a portion of it for an assessment on the property which was subsequently adjudged void. Plaintiff sued to recover said money, claiming to be the owner thereof. His only proof on that subject was that he had paid a subsequent valid assessment. *Held*, That the action could not be maintained; that the surplus belonged to the mortgagor, and that plaintiff's right to be reimbursed for the payment of the valid assessment not being presented or determined, and the real party in interest not being represented, it was unnecessary to raise the objection by answer.—*Day v. The Town of New Lots*, 349.
 15. A mortgage conditioned for the payment of an annuity to the mortgagee during life and for payment to him or the general guardian of his children of a specified sum annually during their minority creates a trust in favor of the children, and the mortgagee cannot give a valid discharge thereof.—*McPherson v. Rollins et al.*, 402.
 16. The record of such a mortgage is constructive notice of its provisions sufficient to put purchasers on inquiry and of the want of power in the mortgagee to discharge the mortgage.—*Id.*
 17. In an action to restrain the foreclosure of a mortgage, brought by a grantee of the land, on the ground that the grantor represented that the land was free and clear, it is admissible to show that the mortgage was given for the purpose of defrauding the creditors of the mortgagor and on no other consideration; that if it was without consideration it could not be enforced against the mortgagor, and the defense was available against the assignee of the mortgage, although he is a *bona fide* purchaser.—*Briggs v. Langford et al.*, 499.
- See CORPORATIONS, 8; DEEDS, 7; DOWER, 2; DURESS, 1; ESTOPPEL, 1; FIRE INSURANCE, 16; MERGER.
- ### MUNICIPAL CORPORATIONS.
1. The exclusion of evidence to show constructive notice to the corporation of the condition of the street prior to an accident is not erroneous where actual notice is conceded to have been received.—*Allison v. The Village of Middletown*, 21.
 2. Municipalities are not liable for injuries occurring on lands of adjacent owners because of the icy condition of such lands in the absence of proof that the

municipality had exercised authority or supervision over it.—*Id.*

3. The legislature has power to confer on municipal corporations power to provide by ordinances a system, and require its execution within its corporate limits, to enforce conformity to the proper standards of all weights and measures used by dealers in the sale and purchase of merchandise.—*The People ex rel. Gould v. The City of Rochester*, 98.
4. The ordinances of the city of Rochester in this respect are reasonable and the authority given by them to the city sealer may be enforced.—*Id.*
5. An ordinance of the city of Albany, made under Chap. 298, Laws of 1883, title 3, §§ 14 23, requiring owners to clear snow and ice from their sidewalks by a certain hour, does not conflict with the provisions of title 9, §§ 28 to 28 of said act which make it the duty of the chief of police to regulate the cleaning of streets and side-walks.—*The People v. Mattimore* 150.
6. A municipal corporation under the part of general power to make police regulations can require the citizens to exercise their rights of property in such a manner as to prevent its becoming pernicious to the citizens generally.—*Id.*
7. Where the complaint alleged that plaintiff was injured by a break in a side-walk and she subsequently presented a written claim to the common council alleging the same cause of injury, and no mention was made in either paper of snow or ice, *Held*, That snow and ice might still be shown as a cause contributing to the injury and was proper to show the circumstances thereof; and this whether defendant was legally negligent or not in allowing the snow and ice to be present.—*Sawyer v. The City of Amsterdam*, 175.

See COSTS, 8.

MUNICIPAL COURT OF ROCHESTER.

See APPEAL, 14; EVIDENCE, 17.

MURDER.

1. It seems that the provisions of the Penal Code, § 181, as amended in 1883, requiring upon a conviction of murder or manslaughter direct proof of the death of the person alleged to have been killed, does not exclude evidence of points and features of resemblance between the mutilated body and the person charged to have been killed, nor does it exclude proof of circumstances tending to establish identity.—*The People v. Beckwith*, 189.

2. Where the crime is committed before the Penal Code took effect it is enough to establish the identity by facts and circumstances sufficiently convincing to exclude all reasonable doubt.—*Id.*
3. By § 181, Penal Code, as amended by Chap. 834, Laws of 1882, direct proof is required of the death of the person alleged to have been killed in an indictment for murder or manslaughter. In the case at bar the body had not been mutilated but was much wasted by decay. No person identified the body positively or by personal peculiarities. Evidence was given that some of the clothing, one boot and a watch found on or near the body had belonged to the person charged as having been murdered and that a valise found near by was his. *Held*, That this evidence was not "direct" within the meaning of the statute and that a conviction was improper.—*The People v. Palmer*, 401.
4. While evidence of premeditated design is sufficient to constitute the crime of murder in the second degree, since the enactment of the Penal Code §§ 183, 184, the design to effect death must be established by the evidence to have been deliberate as well as premeditated to permit a conviction of murder of the first degree, and without such evidence a conviction for a greater offense than murder in the second degree cannot be sustained.—*The People v. Brunt*, 427.
5. The addition of the word "deliberate" requires some appreciable time for reflection preceding the killing, but the celerity of mental action is such that the formation of a definite purpose may not occupy more than a moment of time, the time occupied after the intent in drawing the revolver from the pocket may have been sufficient and it was not requisite that the anger should have abated.—*Id.*
6. Evidence sufficient to sustain a conviction of murder in the first degree.—*The People v. Driscoll*, 475.
7. When a person confined in a common jail upon a lawful commitment for a felony attempts to escape by force from such jail, although he fail in such attempt, and while prosecuting such attempt kills a human being, although the act is committed without the design to effect death, he is guilty of murder in the first degree.—*The People v. Johnson*, 519.
8. In such a case where the warrant of commitment substantially conforms in its terms to the statutory requirement it is *prima facie* evidence that the prisoner is lawfully imprisoned or in custody, and it is not necessary to go behind the warrant of commitment.—*Id.*

9. A common jail is a prison within the meaning of the Penal Code, § 92.—*Id.*

MUTUAL INSURANCE.

1. In the absence of any specification of form of designation in the by-laws of the company, the making of a will by the assured after the decease of the beneficiary named, devising all his property, which will is given to the officers of the lodge with information that it is intended to pass the insurance and retained by them, is a sufficient designation of the beneficiary.—*Kepler v. The Supreme Lodge Knights of Honor*, 211.
2. Where a certificate of mutual insurance contains an absolute promise to pay a certain sum on the death of the member, proof of the death, that proper proofs were served, failure to pay and that the last assessment produced more than enough to pay the claim, is sufficient to show a breach of the contract and that the beneficiaries are entitled to the sum named.—*Fulmer et al. v. The Union Mut. Assn.*, 389.
3. In an action at law to recover on a contract by a life insurance company, conducted on the assessment plan, the agreement was to pay the beneficiary "all the amount realized from one assessment, not exceeding \$2,000." *Held*, That the burden was on the plaintiff to show what amount one assessment would produce, and that failing to make such proof he should have been non-suited.—*O'Brien v. The Home Benefit Soc.*, 395.
4. An occasional use of intoxicating liquors by the insured is not inconsistent with an answer in his application that he is of temperate and correct habits — *Meacham v. The N. Y. State Mut. Benefit Assn.*, 421.
5. The question whether such use amounted to a breach of the conditions of the policy and whether the insured died from dissipation or the excessive use of ardent spirits is for the jury.—*Id.*
6. Evidence sufficient to show that suicide was committed under influence of insanity and was not a voluntary act.—*Id.*

NEGLIGENCE.

1. Under all the circumstances of the case, *Held*, That the several instructions to the jury were without error, and the denial of motion for new trial was correct.—*Smith v. The N. Y. C. & H. R. RR. Co.*, 4.
2. In an action for damages sustained by reason of a defect in a sidewalk, a witness was asked if he ever stumbled and

fell at that place. *Held*, That as the questions put to the witness did not refer to the time when the witness fell, or to the condition of the walk at that time, or that it was in the same condition as when plaintiff fell, they were properly excluded.—*Ster v. Tutty*, 17.

3. An offer to prove that other persons passing back and forth over this walk fell on the same spot where plaintiff fell, "while the walk was in the condition described" was held insufficient, because the "condition described" by the previous witness was not confined to the actual condition the walk was in at the time of the accident; and an offer the exclusion of which is made the basis of error should be strictly construed.—*Id.*
4. The temporary removal of a sidewalk rendered necessary in excavating a cellar and erecting a building is not necessarily and under all circumstances a wrongful act, and amount to the creation of a public nuisance; but the owner, or person removing it, is bound to properly guard and furnish reasonably safe passage for the public, and if such provision is made he is not chargeable with a wrongful act or the creation of a nuisance; and in such case the question of negligence, i. e., whether the walk was left in a reasonably safe and proper condition, is involved in the case.—*Id.*
5. Plaintiff, an employee of defendant, was injured by a collision with a disabled engine which was being taken to the shop for repairs, running wild in charge of an engineer inexperienced in the management of engines in that condition, and who was unable to stop it in time. *Held*, That it was for the jury to determine whether the engineer was negligent and whether his negligence alone caused the injury, and that a motion for nonsuit was properly denied.—*O'Laughlin v. The N. Y. C. & H. R. RR. Co.*, 109.
6. On a bright, clear day deceased, who was familiar with the crossing, started to cross the tracks with one P., carrying a basket of coal, and was struck by a car being switched and moving by its own momentum. It appeared that the car could have been seen if deceased had looked. *Held*, That he was guilty of contributory negligence.—*Woodard v. The N. Y., L. E. & W. RR Co.*, 115.
7. To be an excuse, the object which diverts the attention must be something which can justify, consistently with prudence, the withdrawal of attention from the near and imminent danger.—*Id.*
8. Where property was left by plaintiff on defendant's premises and failed to find them a year afterward, defendant giving him full permission to search, *Held*, That

- in the absence of proof of conversion or destruction or of defendant's carelessness, defendant was not liable.—*Jackson v. Elghmie*, 193.
9. In an action for injuries caused by falling over a board in the aisle of one of defendant's cars the brakeman on cross-examination denied having stated to plaintiff that he had forgotten to move it back to its place and that it was his fault. This was taken under objection to the question. Plaintiff on being recalled was allowed to contradict the brakeman and give the conversation including the admission of fault. *Held*, Error; that it was no part of the *res gestæ*; that the evidence came in under the former objection and it was unnecessary to repeat the objection or move to strike out the evidence.—*Sherman v. The D., L. & W. RR. Co.*, 226.
 10. The trustees of the Brooklyn bridge represent the cities of New York and Brooklyn as their agents, and the persons employed by them are agents and servants of the two cities, for whose negligence those cities are liable.—*Walsh v. The Mayor, etc., of N. Y.*, 233.
 11. Plaintiff, who was in defendant's employ, was directed to disconnect a belt and hang it up for repairs, a feat which he had often done before. He found the ladder in position, looked to see if it was all right, ascended and endeavored to seize the belt, which was revolving rapidly, became unconscious, and was found on the floor with his arm torn out and the ladder broken. No one saw the accident. *Held*, That plaintiff was not entitled to recover, as it did not appear that the injury resulted from any defect in the ladder, and he was liable for having elected to do the work in a manner he knew to be hazardous rather than accept precautions which would make it entirely safe.—*Cahill v. Hilton et al.*, 235.
 12. In an action for damages caused by negligence where loss of time is claimed as an item, only nominal damages therefor can be given where there is no proof of the value of the time lost or of facts on which an estimate of such value can be founded.—*Staal v. The Grand St. & N. RR. Co.*, 241.
 13. Where plaintiff's disability is permanent, but there is no proof of his condition in life, earning power, skill or capacity, it is error for the court to charge that he is entitled to compensation for the results that will flow in the future from this injury * * and for pecuniary loss on account of the injury caused by the diminution in his ability to earn a livelihood, and also to consider what expenditures he would incur to make him comfortable.—*Id.*
 14. A steamship company, if bound to provide a surgeon for its ship, its duty to the passengers is to select a reasonably competent man for that office, and it is liable only for a neglect of that duty and not for the negligence of the surgeon employed. It is bound only to the exercise of reasonable care and diligence in performing such duty and is not compelled to select and employ the highest skill and longest experience.—*Laubheim v. Die Koninglyk Nederlandisch S. M.*, 243.
 15. An injury can be voluntary only where the party is aware of the danger to which another is subject, and realizing the inevitable result performs the act which inflicts the injury.—*Stone v. The D. D., E. B. & B. RR Co.*, 265.
 16. In an action for negligence where there is no evidence as to the capacity or intelligence of the injured infant there is nothing on which the jury could base a finding as to whether it was *sui juris* or not, and the court may properly determine that question.—*Id.*
 17. In an action for damages for injuries caused by the falling of a rock from the roof of a tunnel in which plaintiff was at the time employed by defendants, the contractors engaged in the construction thereof, alleged to be due to defendant's negligence, the only evidence as to plaintiff's freedom from negligence was his own testimony to the effect that he could not say whether he had or had not noticed the peculiar and dangerous condition of that portion of the roof which fell upon him. *Held*, That the complaint was properly dismissed, the burden of showing his own freedom from negligence resting upon plaintiff.—*Eades v. Clark et al*, 335.
 18. Action for damages for negligently killing plaintiff's intestate. Under all the circumstances of the case, *held*, that plaintiff made out a case for the jury.—*Bleye v. The N. Y. C. & H. R. RR. Co.*, 409.
 19. In an action for damages for negligence alleged to have caused the death of plaintiff's intestate, defendants offered to show, in mitigation of damages, that they had expended a large sum of money in caring for the deceased between the time of the accident and his death and also upon his funeral. *Held*, That the evidence was properly excluded.—*Murray v. Usher et al.*, 411.
 20. Plaintiff had worked upon ice in what is called "canal" work and had had some experience in storing ice within and in drawing it out from houses. He was ordered to leave the canal and go on a stack, eight feet high. A hook was given him which was dull. He had sharpened, but it was not then satisfi

tory. After two hours' work with it it slipped from a cake into which plaintiff had struck it, or the cake broke, plaintiff lost his balance, fell off the stack and was injured. *Held*, That he could not recover and that it was not negligence to build the stack without any barrier which would prevent men from falling off.—*Thorn v. The N. Y. City Ice Co.*, 404.

21. The deceased, an engineer, was driving train No. 1 east and his train was late. Defendant's road is a single track and runs east and west. Trains were moved by a despatcher at Troy. J., the operator at P. junction, received a despatch to hold No. 1 for orders. He put out a red flag. At this time train No. 2 moving west received a despatch to meet No. 1 at P. junction. After arrival at P. junction it received a despatch to meet No. 1 at Hoosick, a station further east. It moved on. J. took in the flag, supposing the despatch to relate only to No. 2. Trains No. 1 and No. 2 met and passed at Hoosick. During this whole period train No. 6 was coming west from the State of Vermont. Train No. 1 on reaching P. junction saw no flag, did not stop, and about a mile beyond the station collided with No. 6 and the deceased was killed. *Held*, That it was a question for the jury whether defendant had taken sufficient precaution to bring knowledge of its order to the engineer and conductor of No. 1.—*Sutherland v. The T. & B. R.R. Co.*, 469.
22. Plaintiff attempted to cross defendant's tracks on foot. He passed between the two parts of a train that was separated, looked to the west and stepped on the track in front of an engine coming from the east and was injured. *Held*, That he was guilty of contributory negligence in not looking in the other direction.—*Young v. The N. Y., L. E. & W. R.R. Co.*, 540.
23. The question of negligence must be determined on the facts as they existed at the time of the injury, and evidence of subsequent acts of the defendant is incompetent.—*Corcoran v. The Village of Peekskill*, 554.
24. The act of a stranger cannot furnish legitimate evidence of negligence against a defendant.—*Id.*
25. The rule that where pecuniary damages are sought evidence of their existence and extent must be given is not applicable to the statutory action by an administrator for causing death of the decedent; nor is there any discrimination between immediate and collateral relatives as to the degree and nature of the proof required in such an action.—*Kelly v. The Twenty-third St. R.R. Co.*, 572.

See ANIMALS; BANKS, 2; EVIDENCE, 15, 20-22; HIGHWAYS, 3-7, 10-14; MARINE COLLISION; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 1, 2, 7; RAILROADS, 4-6, 8-10, 17, 21; SHIPS; TELEGRAPH; USURY; VILLAGES, 1, 2, 4.

NEGOTIABLE PAPER.

1. The rule, that where a promissory note is made for the accommodation of the payee, but without restriction as to its use, an indorsee taking it in good faith as collateral security for an obligation incurred for the payee and indorser occupies the position of a holder for value and can recover thereon against the maker, applied.—*Moyer v. Urtel et al.*, 61.
2. Defendant was indorser of a note on which plaintiff recovered judgment against the makers by default and had execution issued and levied. The makers were adjudicated bankrupts and the sheriff enjoined. Plaintiff consented to the appointment of the sheriff as receiver and an order directing a sale of the property levied on, the lien to attach to the proceeds. Subsequently it was adjudged that plaintiff's judgment was void as to the assignee as a fraudulent preference. *Held*, That defendant was not prejudiced by the action of plaintiff in the bankruptcy proceeding and that the consent of plaintiff was not a defense to an action against defendant.—*The Jefferson Co. Nat. Bk. v. Streeter*, 149.
3. One who puts his name upon the face of a note preceded by the word "surety" is liable as maker.—*Beaman v. Lyon*, 168.
4. Payment must be pleaded although the complaint contains a formal allegation of non-payment and the answer is, among other things, a general denial.—*Id.*
5. Possession of a note is *prima facie* evidence of delivery and is enough in the absence of evidence proving non-delivery.—*Id.*
6. A note given to a third party by a debtor on account of a debt owing by him if made in pursuance of some understanding between the creditor and the debtor would have for its support a valuable consideration, and such third party, inasmuch as he was named payee in it, can maintain an action upon the note in his own name, whatever view might be taken of the question whether or not such payee, as between himself and the creditor, was beneficially interested in the proceeds of the note.—*Hoxie v. Kennedy et al.*, 257.
7. The bar to recovery by a discharge in bankruptcy may be removed by a new promise, and liability restored, but an objection that the promise was made to

a third party who was a stranger to the transaction would be good, because the promise must be made to the creditor. In this case, however, that was a question of fact for the jury.—*Id.*

8. Where a note has been destroyed while in the possession of plaintiff, he is not required to give indemnity as provided by § 1917 of the Code as a condition of recovery.—*Id.*

9. Where a note is made and indorsed to be used by another to obtain money on it for the maker, or in case of failure to do so to be returned to the maker, and the person to whom it was delivered for that purpose without consideration delivers it to others in payment of his own debt, such an act constitutes a fraudulent diversion of the note.—*Vietor et al. v. Bauer et al.*, 284.

10. Where the sole consideration for a transfer of a note fraudulently diverted is a credit of the same on an antecedent debt of the transferor the maker and indorser may relieve themselves from liability by showing the fact of such diversion, and it is error to exclude proof of such facts.—*Id.*

11. The burden of showing that the promissory note sued on is invalid for any cause is upon the defendant.—*Bottum et al. v. Scott*, 370.

12. A defense that the contract on which the note was given was a wager contract does not dispense with proof to substantiate the defense.—*Id.*

13. Where a complaint on a promissory note does not allege a valuable consideration, an admission by defendant's counsel of the making and delivery of the note "and all except the ownership," will not preclude defendant from showing that the note never had a valid inception because not supported by any consideration.—*Barry et al. v. Lewis*, 382.

14. Mere indulgence by a creditor of the principal debtor will not discharge the surety; there must be an agreement for an extension without the surety's consent on a valid consideration which precludes the creditor meanwhile from enforcing the debt.—*Powers v. Silberstein*, 542.

15. Where there is a conflict of evidence as to whether such an agreement was made the question should be submitted to the jury.—*Id.*

See BOUNTIES, 1; COUNTY; PARTNERSHIP, 5.

NEW TRIAL.

See APPEAL, 15; CRIMINAL LAW, 3, 6, 7; PRACTICE, 13, 15.

N. Y. CITY.

1. A provision in a lease from the city authorizing a structure to be erected differently from that required by law is no defense to an action to restrain the erection of such building until the requirements of the law are fulfilled and for a penalty for a violation of the law.—*The Fire Dept. of N. Y. v. The Atlas SS. Co.*, 178.

2. Section 8, Chap. 547, Laws of 1874, constituting the board of examiners, is not unconstitutional.—*Id.*

3. The determination of such board cannot be reviewed by the courts even if its requirements are unreasonable, so long as they are not wholly impracticable.—*Id.*

4. The city ordinances in regard to blasting are for the protection of the general public, and though complied with, a court of equity may go further, and where special circumstances exist, compel the excavator to carry on his work without imperiling adjacent buildings.—*Rogers v. Hanfield et al.*, 354.

5. Chapter 572, Laws of 1886, in regard to filing notice prior to bringing actions for personal injuries against certain cities, was not intended to apply where the action is commenced within the six months by the service of the summons and complaint on the corporation counsel, for then the notice required for the city's protection is fully given by the action itself.—*Mayer v. The Mayor, etc., of N. Y.*, 433.

See ASSESSMENTS, 2; FERRIES; JURISDICTION, 1.

NUISANCE.

1. In the absence of a statute prescribing or sanctioning the location of a gas factory or storage tank the company is not relieved by the fact of its incorporation from liability for damages to adjoining property caused thereby. Its authority to hold property for such purposes confers no authority which will justify an injury to private property.—*Bohan v. The Port Jervis Gaslight Co.*, 186.

2. Defendant's steamboat was lying at a dock when its boiler exploded and injured plaintiff's steamboat which was at the same dock. It appeared that the boiler which exploded was in good condition. No negligence was shown upon the part of defendant or his servants and no cause for the explosion could be discovered. But it further appeared that the boat had no government license and the captain and engineer had none. *Held*, That irrespective of the question of negligence, the running of the boat in defiance of

these statutes was to maintain a nuisance and that plaintiff could recover.—*Van Norden et al. v. Robinson*, 851.

3. It is not sufficient that obstructions in a street are necessary with reference to the business of him who creates and maintains them, but they must also be reasonable with reference to the public.—*Callanan et al. v. Gilman*, 462.
4. The defendant, however, should not be restrained entirely from using such obstructions, but only from unnecessarily or unreasonably obstructing the passage of the public along the sidewalk.—*Id.*

See INJUNCTION, 4.

OYSTERS.

See FISHERY, 2, 3.

PARTIES.

1. In this action on a note plaintiff proved an order appointing a receiver of its property on the ground of its insolvency and the statute of New Jersey providing for such appointment when any corporation shall be dissolved. *Held*, That the action could not be maintained in the name of the corporation, it appearing that it no longer had a corporate existence.—*The Merchants' L. & T. Co. v. Clair*, 322.

See ASSIGNMENT FOR CREDITORS, 1; BANKRUPTCY, 2; CORPORATIONS, 8; EJECTMENT; EXCISE, 3; FERRIES, 4; MORTGAGE, 3, 4.

PARTITION.

1. The court has jurisdiction in an action of partition to grant an order on the *ex parte* application of the receiver for the leasing of the property for a time certain which may extend beyond the termination of the litigation, and has the power to set aside or modify such order, but it is proper, as a condition for granting such modification, to award indemnity out of the fund to *bona fide* lessees.—*Weeks et al. v. Cornwell et al.*, 185.
2. After a sale of real estate has been made and confirmed by a final judgment in an action in partition, it is final and conclusive against all the parties thereto and their legal representatives, although such action was brought by a person, such as tenant by the curtesy, forbidden to institute or prosecute it, and there is no exception in this respect in favor even of infant defendants.—*Reed v. Reed et al.*, 244.
3. An action of partition was brought by a trustee under a will in which the remaindermen were not made parties. *Held*, That the remaindermen were not con-

cluded by the judgment.—*Moore et al. v. Appleby*, 529.

4. One who contracts to purchase the property from the purchaser at the sale thereunder should not be compelled to complete his purchase and is entitled to recover back the amount paid thereon.—*Id.*
5. In an action to recover back the money so paid an extra allowance should be based on the amount paid, and not on the value of the property.—*Id.*

See WILLS, 17.

PARTNERSHIP.

1. Plaintiff and defendant entered into an agreement to enter into business together, each contributing capital and that when defendant should be repaid the excess of capital contributed by her the net profits should be equally divided and that each should bear half the losses, and thereupon began to do business. *Held*, That this constituted a partnership *in presenti*, and not one to commence when defendant's excess was repaid.—*Vajen v. Birngruber*, 105.
2. Where one of the members of a firm which is indebted retires and another person takes his place, the business being conducted under the same name and in the same manner as before, to sustain a claim that a subsequent general payment on account should be credited to the new account and not to the old one it must be shown that the money paid was the property of the new firm.—*Thurber et al. v. McIntyre*, 128.
3. Although as between themselves the members of a firm may restrict the rights of one partner to a particular branch of the business, yet where such partner assumes all the duties and rights of a partner in all the business of the firm he is liable as such to persons dealing with the firm, and his liability is not restricted by such arrangement.—*The St. Nicholas Nat. Bk. v. King*, 187.
4. Evidence insufficient to show a partnership.—*Sipfle et al. v. Isham*, 400.
5. In an action on a note alleged to have been made by defendants as partners the partnership was not proved or found and it was not made to appear that the defendant answering gave the other authority to make a note to bind him. *Held*, That plaintiffs were not entitled to recover.—*Id.*
6. On the death of one of the partners in a firm his widow and son formed a new partnership with the survivors, the agreement providing that the widow and son should pay one-third of the liabilities of

the old firm. *Held*, That their liability, if any, must be measured by such agreement, but that it could be enforced only by the old firm and not by its creditors.—*Serviss v. McDonnell*, 478.

7. The several members of a copartnership have no individual interest in the partnership assets except in the surplus that shall remain after an adjustment and settlement of the partnership affairs; and whether or not there is any interest in partnership property which is liable to levy of an attachment, or execution, issued in an action against one of the members of a firm for the collection of an individual debt, depends upon the fact whether the firm is solvent or not at the time the levy is made and upon an accounting there would be a surplus, after the payment of all the firm liabilities.—*Sterrett et al. v. The Third Nat. Bk.*, 516.
8. Solvency imports adequate means of a party to pay his debts, which embraces within its meaning the opportunity by reasonable diligence to convert and apply them to such purpose, and where the assets of a firm consists of property of a character that has a constantly fluctuating market price, the financial condition of the firm owning it is not necessarily established by the fact that the price for an hour or a day named would produce an excess of its liabilities so as to furnish an interest in the individual partners and subject the firm property to the process of their respective creditors.—*Id.*
9. In an action for conversion of partnership property on attachment against one of its members the question simply is whether there were sufficient assets to pay the firm debts and produce a surplus, and that depends upon the then existing rights of the firm; if there are interests not available for the purpose of an accounting between the members of the firm themselves, arising out of fraudulent transfers of property fraudulent as to creditors, such interests are not available as a defense of an action of this nature but the relief must be sought in a proper action where all of the parties may be brought into court.—*Id.*

See AGENCY, 2; COSTS, 2; EVIDENCE, 18; FIRE INSURANCE, 11; PRACTICE, 5.

PATENTS.

1. Plaintiff licensed defendant to manufacture and sell certain articles within certain territory, agreeing not to manufacture said articles himself. Subsequently the patent was reissued. *Held*, That there was a sufficient consideration for defendant's agreement to pay royalties and that it was liable therefor.—*Hyatt v. The Dale Tile Mfg. Co.*, 130.

2. Where notice of forfeiture for non-payment of royalties has been withdrawn on a promise of the licensee to pay, a failure to carry out such promise gives a good cause of action.—*Id.*

PAYMENT.

See CHARTER PARTY, 1; CREDITORS' ACTION, 2; EXECUTORS, 10; NEGOTIABLE PAPER, 4.

PENAL CODE.

See MURDER, 1-4, 9; VAGRANTS, 1.

PENALTIES.

1. In an action for a penalty when the evidence is insufficient legitimately to produce an inference entitled to the character of evidence to that effect, and it appears that the defendant raised the question of the sufficiency of the evidence to establish a case against him, the County Court is justified in reversing the judgment of a justice of the peace for insufficiency of the evidence to fairly justify the recovery.—*The Village of Suspension Bridge v. Bedford*, 423.

PERJURY.

1. Perjury cannot be assigned upon an affidavit attached to an account for services against the city of Buffalo, it not having been used by the claimant, or delivered by him to any person to be used, in procuring an audit of the account, by presenting it to the common council.—*The People v. Allen*, 236.
2. An indictment for perjury is sufficient if it negatives in substance the facts sworn to by defendant. *So held*, Where the indictment set forth the facts sworn to and alleged that at the time defendant well knew them to be false and untrue.—*The People v. Clements*, 309.
3. A demurrer to an indictment for imperfection in the form of the allegations is not permissible.—*Id.*
4. Upon the trial of an indictment for perjury in falsely testifying in an action for divorce that he, the prisoner, saw the defendant in a house of prostitution with P., and that he gave money to a girl for the purpose of illicit intercourse, P. testified on behalf of the prosecution that it was false; whereupon, being recalled by the prisoner after the prosecution rested, he was asked whether he had not at a specified time and place made statements that the fact was true; but the question was excluded. *Held*, That the question would be competent on cross-examination, and perhaps it was within the discretion of the court to exclude it at the

- time it was put, the objection was not placed upon that ground, and as the question bore upon the credibility of the witness, the prisoner was deprived of important testimony, and justice requires that a new trial should be granted.—*The People v. Thornton*, 559.
5. It is the general practice in criminal trials, when defendant's counsel has overlooked or forgotten evidence, to allow much latitude in permitting it to be called out in subsequent stage of the proceedings.—*Id.*
 6. Upon a criminal trial for perjury in falsely testifying to the guilt of a defendant in an action for divorce, it is competent to show that the prisoner was intimate with the defendant's wife, as tending to show a motive for testifying against him.—*Id.*

PHYSICIANS.

1. Physicians and surgeons assume and are required to possess, at least, ordinary professional intelligence and skill, and to exercise it in the treatment of their patients with the best of their judgment, but they are not required to insure results, or to guarantee that the consequences will be beneficial, and when their errors are those of judgment only, if they keep within recognized and approved methods, they will not be liable for the consequences.—*Wells v. The World's Dispensary Med. Assn.*, 73.
2. When the condition of a patient is such, at the time of the performance of a surgical operation as to require of ordinary professional intelligence and skill the knowledge or a reasonable apprehension that results as injurious to a patient in her particular condition as those which did follow would follow the surgical operation, in such case the physician or surgeon is liable for such consequences.—*Id.*

See EVIDENCE, 1, 9, 10, 20, 21.

PLEADING.

1. To warrant the striking out of an answer or a part thereof as sham, it must be so plainly so that there can be no controversy or argument on the subject. *So held*, Where the defense of the statute of limitations was stricken out as sham.—*Schoonmaker v. The Mayor, etc., of N. Y.*, 19.
2. A cause for action for an account of moneys the proceeds of stock of plaintiff sold by defendants without her authority and one for damages sustained by such unauthorized sale cannot be united in the complaint.—*Dodge v. Glendenning*, 143.

3. The objection that the action is barred by the statute of limitations cannot be taken by demurrer.—*Hedges v. Conger*, 159.
4. A judgment was recovered by plaintiff for the proceeds of two notes given to defendant for sale and claimed to have passed out of his hands. Learning that this was untrue as to one of the notes, plaintiff had his judgment set aside and subsequently brought this action for conversion of the other note. Before the trial and a year after setting aside the former judgment the complaint in that action was amended so as to include only the note not involved in this action. *Held*, That the amendment was too late; that on learning of the facts plaintiff was bound to elect as to his remedy and to amend promptly.—*The Bowker Fertilizer Co. v. Cox*, 191.
5. Allegations in the complaint which have been admitted in the answer cannot be contradicted by evidence, and a judgment contrary to such admissions will be set aside.—*Getty v. The Town of Hamlin et al.*, 288.
6. Where a pleading is verified by an agent of the party pleading, the nature of the agency need not be set out in the verification.—*Beyer et al. v. Smith et al.*, 496.
7. The court will not set aside a pleading even though it appear that the agent could not truthfully have verified it.—*Id.*
8. That the cause of action alleged in the complaint is a tort is no obstacle to setting up a counterclaim in the answer if it have the requisites provided in § 501, subd. 1, Code Civ. Pro., but it must be alleged that the matter set out as counterclaim arose out of the transaction which is the foundation of plaintiff's claim or that it is connected with the subject of it. If it does not contain such allegations the pleading will be held insufficient on demurrer although it might be treated as sufficient for the purposes of a trial.—*Green v. Parsons*, 544.

See APPEAL, 10; CREDITOR'S ACTION, 1; EXCISE, 2; FRAUD, 9; GIFT, 4; HIGHWAYS, 4; NEGOTIABLE PAPER, 4; REPLEVIN, 3; SALE, 3, 4; SPECIFIC PERFORMANCE, 3.

POLICE.

1. On a trial of charges against a police officer before the commissioners he is entitled to introduce any testimony to disprove the charges, and a refusal to allow him to do so is error.—*The People ex rel. Blake v. Whittemore et al.*, 218.
2. Where an officer of previous good record while upon his post became exhausted

- by reason of weakness caused by prior injuries received in the discharge of duty and took a single drink of whiskey to keep up his strength, which caused intoxication. *Held*, That this single act could not, because of its unexpected results, be held to be conduct unbecoming an officer.—*The People ex rel. McBride v. French et al.*, 270.
3. To entitle a policeman to apply for retirement under § 307 of the Consolidation Act, as amended by Chap. 864 Laws of 1885, where a portion of the period of twenty years has been served in the metropolitan police, it is not necessary that a continuous period of twenty years service shall have been performed, but the terms of service may be added together to produce that period.—*The People ex rel. Bolster v. French et al.*, 297.
 4. Relator, having been ill, reported for duty sooner than he should have done, and while on duty was taken with a chill for which a friend persuaded him to drink a little brandy. He did so and in his weakened condition became intoxicated. *Held*, That this would not authorize his removal on a charge of conduct unbecoming an officer.—*The People ex rel. Brady v. French et al.*, 305.
 5. The board of police commissioners of the city of Albany have power under the acts creating it to fix the salaries of patrolmen at any sum under \$900.—*The People ex rel. Decker v. Police Comrs*, 499.
 6. It may also, under its powers to regulate and govern the police force, establish a "veteran" grade of men, who may be paid a smaller sum than other patrolmen in active service.—*Id.*
- ### PRACTICE.
1. Where plaintiff has rested his right of recovery exclusively on his title to land, both in his complaint and the trial, it is error for the General Term to affirm on other grounds; plaintiff must stand or fall on the question litigated by him.—*Vail v. The L. I. R.R. Co.*, 65.
 2. The Supreme Court at Special Term has no jurisdiction to correct or otherwise interfere with the minutes of the Circuit Court.—*Jones v. The Merchants' Nat. Bk.*, 69.
 3. The burthen is on plaintiff to prove the facts upon which his right to recover depends, and where the witnesses called by defendant have such a relation to defendant and to the transaction in reference to which their evidence is given as to present to some extent the question of credibility, yet if there is no evidence fairly tending to prove the contrary, the facts testified to by them must stand as stated, because of such burthen on plaintiff.—*Wells v. The World's Dispensary Med. Assn.*, 73.
 4. Where on the trial of an action by the court at Special Term the evidence on the part of the plaintiff is sufficient to call upon the court to consider the question of fact, it is error for the court to dispose of the case without consideration of the facts and treat the case as raising questions of law only.—*Stark v. Soule*, 80.
 5. Under a simple denial of an allegation of partnership a defendant cannot claim that there were other parties interested in the firm who should be parties plaintiff.—*Karelson et al. v. The Sun Fire Office*, 148.
 6. A charge is not to be judged by an isolated sentence severed from its connection with the balance of the charge, but by its general scope and the effect it must have had on the jury. If it is evident that the jury could not have been misled and the real issue was properly submitted the verdict must stand notwithstanding some erroneous expressions in the charge.—*Schreiber v. The Twenty-third St. R.R. Co.*, 192.
 7. In an action on a life insurance policy there were two claimants for the money and an order of interpleader was made and the company paid the money into court. *Held*, That the action was of an equitable nature and triable by the court, and that the court was not bound by the finding of the jury on specific questions submitted to them, but might disregard it and find the contrary.—*Clark v. Mosher*, 241.
 8. It cannot be said there is a question for the jury on the facts when both parties to the action treat the questions in controversy as questions of law only and the court is not requested to submit any questions to the jury.—*Kirtz v. Peck*, 263.
 9. A request to direct a verdict is in effect a submission of the questions of fact to the court and a waiver of the right to go to the jury.—*Gregory v. The Mayor, etc., of N. Y.*, 300.
 10. In an action for injuries sustained by the fall of an elevator to plaintiff while in defendant's employ application for an adjournment was made on an affidavit stating that a material witness was unable to attend by reason of sickness, and that he would testify that as superintendent he had forbidden the men to ride on the elevator. *Held*, That in the absence of denial of these facts a case for adjournment was made and it was error

to deny it.—*Obart v. The Simonds Soap Co.*, 811.

11. A motion to correct an irregularity in a decree must be made promptly and before taking other proceedings in the case.—*In re estate of Hood*, 818.
12. Where the party aggrieved appealed from the decree relying on such irregularity for reversal and allowed two years to elapse before making his motion, *Held*. That he was guilty of laches.—*Id.*
13. To sustain a motion for a new trial on the ground of misconduct on the part of a jury the applicant must show some irregularity or misconduct by which he was prejudiced.—*Rankin v Nelson*, 348.

14. The court cannot be required to reiterate in different verbiage propositions which it has already charged —*Bottum et al. v. Scott*, 870.

15. Where the evidence is such as to present a question of fact for the jury such that it would have been error to withdraw the case from their consideration by a nonsuit or direction of a verdict for the defendant, and the relation of the witnesses to the subject of the action whose evidence related to the main fact was such that their credibility was for the consideration of the jury in determining what the evidence given by them respectively proved, it presents a case so peculiarly within their province that it is difficult to see how the court could so measure the force which the jury gave to the evidence as to reach the conclusion that the verdict was so against the weight of the evidence as to justify a new trial.—*Brown v. Martin*, 435.

As to practice on appeal, see APPEAL, 3, 6, 7, 18, 19.

As to practice in criminal cases, see CRIMINAL LAW; FORGERY, 2; MURDER, 2; ROBBERY, 1.

As to practice in different classes of cases, see those titles, as CREDITOR'S ACTION, 5; DIVORCE, 1; EMINENT DOMAIN, 5; INJUNCTION, 1; LIFE INSURANCE, 3; NEGLIGENCE, 1, 5, 13, 16, 21; TRESPASS, 1.

See also. CONTRACT, 11; COSTS, 5; DECEDENTS' ESTATES, 3; DEEDS, 6; DEPOSITIONS, 5; EVIDENCE, 22; FIRE INSURANCE, 17; FRAUD, 4; HIGHWAYS, 3, 7; JURISDICTION, 3, 4; NEGOTIABLE PAPER, 15; PLEADING, 1, 4, 5; RAILROADS, 21; REFERENCE, 2, 5; REMOVAL, 3; RIPARIAN OWNERS, 1.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRIORITY.

See ASSIGNMENT FOR CREDITORS, 9; RECEIVERS, 8, 4.

PROBATE.

See WILLS, 4, 9-11, 20-22, 25-27.

PUBLICATION.

See SERVICE.

RAILROADS.

1. When a sleeping-car porter is not engaged about the transportation of passengers and not on the train by which the passenger is to be transported or connected therewith the relation of master and servant does not exist between him and the railroad company, and the latter is not liable for his acts. *Dwinelle v. The N. Y. C. & H. R. RR. Co.*, 55.
2. In proceedings to acquire lands for a railroad, the petition omitted to state the residences of the persons interested in the lands proposed to be taken. *Held*. That as such persons had appeared by attorneys, this was sufficient to give the court jurisdiction, without an amendment, but the amendment was one which the court had power to make in its discretion.—*In re The R., H & L. RR. Co. v. Babcock et al.*, 59.
3. The presumption is that a foreign company, organized for the construction of railroads, is authorized by its charter or the laws of its creation to take and hold stock in a railroad company of this State, and the burden of proof rests upon those who assert the contrary.—*Id.*
4. A railroad company is not bound to use the highest degree of diligence to make its station platforms safe, convenient or useful; it is bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purposes to which it is devoted.—*Laftin v. The Buff. & S. W. RR. Co.*, 94.
5. Where an appliance, machine or structure, not obviously dangerous, has been in daily use for years and has uniformly proved adequate, safe and convenient its use may be continued without imputation of culpable imprudence or carelessness.—*Id.*
6. The fact that it was dark and the platform not plainly visible makes it incum-

- bent on the passengers to exercise greater care.—*Id.*
7. Chapter 582, Laws of 1880, so far as it authorizes the appointment of commissioners whose order shall be a substitute for the consent of the city authorities, is unconstitutional.—*In re application of the N. Y. District R. Co.*, 127.
 8. Plaintiff was injured by a parcel falling from a rack above his seat. *Held*, That defendant was only required to exercise reasonable care according to the circumstances of each case to prevent accidents of this nature, and that there being nothing extraordinary about the parcel or its position in the rack to attract attention to it the failure of the train hands to order its removal was not negligence.—*Morris v. The N. Y. C. & H. R. RR. Co.*, 155.
 9. A passenger on a railroad who has been brought into a depot by one of its owners is entitled to a safe passage out of it and has a right to act on the assumption that every necessary precaution has been taken to make it safe, and a right to regard the platform as a safe and proper place to stand.—*Archer v. The N. Y., N. H. & H. RR. Co.*, 181.
 10. It is negligence for a railroad company to bring without notice a train at a rapid rate of speed up to a station among incoming and outgoing passengers, especially when its cars are so constructed as to sweep a portion of the platform provided for passengers.—*Id.*
 11. A photograph of the place of accident, if a fair representation of the premises, is admissible as an aid to the investigation as much as a map or other diagram.—*Id.*
 12. Before a property owner can be legally asked to consent to the construction of a railroad under the rapid transit act there must be placed before him the necessary materials which the statute prescribes; and where such necessary materials do not exist at the time such consent is asked there is no legal application for consent and no refusal and the court is entirely without jurisdiction of proceedings under said act.—*In re petition of the N. Y. Cable Co.*, 214.
 13. Chapter 268, Laws of 1886, repealing the charter of the Broadway Surface RR. Co. and dissolving the corporation, and Chap. 310 of the same year, are constitutional and valid.—*The People v. O'Brien et al.*, 365.
 14. The railroad proper and its franchise were not destroyed by Chap. 268, but passed as a legal estate charged with the mortgages and other legal burdens to the directors of the company as trustees for the creditors and stockholders; and such trust was transferred to the receiver under Chap. 310.—*Id.*
 15. A franchise which is not simply the bounty of the State, but is also dependent on contracts with property owners and cities, is perpetual.—*Id.*
 16. Chapter 271, Laws of 1886, providing for the sale of the consents of the property owners and the city and §§ 5, etc., of Chap. 310 of same year, in relation to evidence of claims, are unconstitutional.—*Id.*
 17. Plaintiff, who was an employee of defendant, was injured by the breaking of a stake on a car of lumber while in transit. The car was furnished by defendant without stakes, which were put in by the shipper. There were no rules as to inspection of such cars, but the station agent superintended the loading of the car. *Held*, That it was the duty of defendant to fit and prepare the car for the use to which it was put, and it was liable for an omission of that duty and for the negligence of the shipper.—*Bushby v. The N. Y., L. E. & W. RR. Co.*, 393.
 18. A railroad corporation is not dissolved by a mere failure to build its road within the time prescribed by its charter; a judicial proceeding and judgment are necessary.—*Day et al. v. The O. & L. C. RR. Co.*, 465.
 19. Where the charters of both companies give them the power to contract and make leases, a lease of one road to the other is valid, although one may be a foreign corporation.—*Id.*
 20. Under the circumstances of the case, *Held*, That the earnings of the road could be applied by its directors as in their discretion they might deem best for the company, and that the holders of its net income mortgage bonds were not entitled to priority of payment over charges for the leased road.—*Id.*
 21. Plaintiff was a brakeman in defendant's employ, and was knocked from a car by a collision with the engine, and pushed before the car until he was run over. It was proved that the accident could not have happened if the brake had been in good order and well set. *Held*, That a nonsuit was error.—*Lilly v. The N. Y. C. & H. R. RR. Co.*, 485.
 22. Defendant's railroad ran through a rocky cut, one side of which bounded plaintiff's pasture lot. Defendant never erected a fence along the cut. Plaintiff's horse, being in said lot, fell into the cut and was killed. *Held*, That defendant was liable, having neglected the statutory

duty to maintain a fence, prescribed by § 8, Chap. 282, Laws of 1854—*Graham v. The D. & H. C. Co.*, 526

23. The action was in form for negligence. *Held*, That the action could be maintained in this form.—*Id.*

24. Where the authority given by the statute to appropriate lands for a public use is limited by the statute giving the power, the estate which may be taken cannot be enlarged without compensation to the owner.—*Miner v. The N. Y. C. & H. R. R.R. Co.*, 587.

25. But when such statute does not in terms so limit the use as to terminate it with the term of corporate existence, the use in the contemplation of the statute is not necessarily dependent on the corporate existence as declared by the statute, and when the act defined the use for which such lands should be taken as an appropriation "for the use and accommodation of such railroad or its appendages," this use, the public use to which it must be devoted, seems to be the only qualification to the easement, and the time of the continuance, so long as it is so used, is not limited.—*Id.*

26. Commissioners of highways have no legal capacity as such to maintain an action to restrain a railroad from changing its terminus.—*Moore et al. v. The Brooklyn City R.R. Co.*, 576.

28. The threatened violation of a mere naked, legal right unaccompanied by special circumstances, is not a ground for injunction when legal remedies are adequate to redress any resulting injury.—*Id.*

See EMINENT DOMAIN; MORTGAGE, 5, 6; NEGLIGENCE, 21; TAXES, 2; TOWN BONDS

RECEIVERS.

1. A receiver may be required to account on the application of a creditor of the estate, even though the original action in which he was appointed has been compromised by the parties thereto.—*Chaude v. Chaude*, 126.

2. Prior to its dissolution the corporation obtained a writ of error to review a judgment recovered against it in Tennessee, gave a bond and assigned certain property in this State to secure the sureties. On learning this the receiver in the action to dissolve intervened in the hearing of the writ of error in the U. S. Supreme Court and procured a reversal. He was not made a party, however. *Held*, That the funds in his hands were not liable for a judgment subsequently rendered by default in Tennessee in said case; that

he did not make himself liable for the final result of the litigation.—*The People v. The Knickerbocker Ins. Co.*, 179.

3. The fact that a corporation which is dissolved was owing debts for labor creates no equity for their payment in preference to the bondholders where the proceedings to dissolve were had before the passage of the act of 1885.—*Raht v. At-trill et al.*, 208.

4. The fact that the workmen had become riotous and threatened to burn the property will not render the debt incurred by the receiver for their payment a necessary expenditure incurred in the care or preservation of the property in the absence of proof that attempts were made to secure the intervention of the public authorities to suppress the riot.—*Id.*

See ASSIGNMENT FOR CREDITORS, 8; CORPORATIONS, 4; PARTIES.

RECORD.

1. One who claims rights as a subsequent purchaser under the recording act must plead and prove not only that he was a purchaser of record, but that he was a purchaser in good faith and for a valuable consideration.—*Seymour v. McKinstry et al.*, 337.

REFERENCE.

1. In an action for goods sold and money loaned, etc., the answer, besides a general denial, set up a copartnership between the parties and alleged that the indebtedness, if any, was incurred by said partnership and not otherwise. *Held*, That this being the true issue, a reference could not be had.—*Cuming v. Whiting*, 9.

2. The provisions of Rule 30 in respect to the filing of the report of a referee, giving notice thereof and filing exceptions thereto, has no application to a reference ordered by the court for the purpose of enabling it to determine questions involved in a motion pending before it. *So held*, Where, upon a motion to open a default, the affidavits being contradictory as to when the complaint was served, a reference was ordered to take proofs, and upon the coming in of the report the same was confirmed and an order made allowing defendant to answer upon terms.—*Martin v. Hodges et al.*, 47.

3. In such case, the hearing upon the referee's report was but a continuation of the original motion, and the court had no power to allow costs as for two motions.—*Id.*

4. Where an accounting is a necessary part of the relief sought and the true condition

of the accounts between the parties is the main issue presented, a reference is proper, although rights under the contract out of which they arose may be also involved.—*Genet v. The D. & H. C. Co.*, 98.

5. Where the whole issue is of fact and is tried by a referee, judgment may be entered upon filing his report with the clerk of the court, without service of a copy upon the attorney for the opposite party.—*Crook et al. v. Crook*, 357.
6. The court has no power to extend the time to appeal, when properly limited by service of judgment and notice of entry, and such time has expired.—*Id.*
7. A party to a reference who is aware of irregularities in the conduct thereof, before the making of the report, *e. g.*, in the receipt of testimony and hearing of argument in the absence of and without notice to such party, and who, notwithstanding such knowledge, fails to object to such irregularities till the making and filing of an adverse report, will be deemed to have waived such irregularities.—*McAllister v. Case et al.*, 501.
8. It sufficiently appearing herein from the pleadings and the bill of particulars that the examination of a long account would be directly involved in the trial, and it also appearing from the record that no difficult questions of law were presented, *Held*, A proper case for a reference of the whole issues, including those made by the counterclaims.—*Robinson v. The N. Y., L. E. & W. R.R. Co.*, 527.

See DECEDENTS' ESTATES; DIVORCE, 1.

RELIGIOUS CORPORATIONS.

1. An absolute deed of land to a religious corporation without conditions or restrictions creates no trust beyond the general duty which requires such corporation to use its property for the purposes contemplated in its creation; the corporation acquires an absolute fee which it can transmit to a vendee with the judicial consent, and when that occurs the proceeds take the place of the land.—*In re The First Presbyterian Soc.*, 106.
2. The registry only becomes of importance when it excludes a lawful voter or admits an unlawful one.—*Id.*

REMOVAL.

1. The want of skill for which an officer must be responsible under the general rules governing the fire dept. of N. Y. City is that from which unnecessary loss of life or property actually results.—*The*

People ex rel. McCabe v. Fire Comrs., 89.

2. An inspector of kerosene oil is a member of the fire department and cannot be removed without a hearing and conviction.—*The People ex rel. McLoughlin v. Fire Comrs.*, 184.
3. In an action for salary where due mailing of a notice of removal is shown, but plaintiff testifies that such notice never reached him, an issue is presented for the jury, and it is error to direct a verdict for plaintiff.—*McCoy v. The Mayor, etc.*, of N. Y., 286.
4. In the absence of a statute expressly conferring it, the commissioners of excise of N. Y. have no power to suspend their employees so as to deprive them of their pay.—*Gregory v. The Mayor, etc.*, of N. Y., 800.

See POLICE; SCHOOLS,

RES ADJUDICATA.

See BAR; CHARTER PARTY, 3.

REPLEVIN.

1. After plaintiff had testified from recollection to alleged false representations made to him by defendant's agent and which induced him to make the sale in question, he was allowed to introduce a memorandum made at the time of the conversation, which contained the items of the goods sold and also a statement of the alleged representations. *Held*, Error; that the memorandum was unsworn evidence and introduced only to fortify the credibility of the witness.—*Hurd et al. v. Burch et al.*, 418.
2. In an action of claim and delivery the referee must find the value of the property at the time of trial.—*Id.*
3. Where the complaint merely alleged that plaintiff was lawfully possessed of the goods, etc., and the answer contained a general denial and averred a seizure of the goods under an attachment as the property of another and that any pretended transfer to plaintiff was made in fraud of creditors, *Held*, That as plaintiff omitted to set forth his title or right of possession as mortgagee, defendant was not required to allege in his answer the facts relied upon as showing that the mortgage was fraudulent. That the general denial put in issue the title or right of possession, and defendant had a right to show any facts that would sustain the answer.—*Avery v. Mead*, 549.

See CONVERSION, 5; FACTORS, 2.

RESCISSION.

See GIFT, 1, 2; SALE, 2.

RESTITUTION.

1. Where a party or his attorney, through aid of the court, have come into possession of property or money during a litigation which subsequent proceedings show was wrongfully acquired or unjustly retained, they may be compelled to restore it by order and attachment, even though it was received by the attorney as costs.—*Forstman v. Schulting*, 535.

REVIVOR.

1. Under § 757 of the Code, as it now stands, an action may be revived on motion of the representative of a sole deceased defendant where the cause of action survives.—*Pierson v. Morgan*, 13.
2. The only modes in which the court can give a party the benefit of § 755, Code, as to non-abatement of certain actions, are those provided by the succeeding sections.—*Lyon v. Park et al.*, 480.
3. When one of two defendants dies, the action cannot be continued against his representatives under the provisions of § 757, Code.—*Id.*
4. The provisions of the last sentence of § 758, Code, as to severance of action on joint and several liability, in case of death of one of several parties, are discretionary, and not to be applied in case of great laches.—*Id.*

RIPARIAN OWNERS.

1. In an action for diversion of water it was claimed that there was no injury as there was always water in the stream by plaintiff's lot for domestic purposes. The evidence showed that there were times when none flowed past plaintiff's lot and that it was not returned in time to reach that part which it would otherwise touch. *Held*, That the evidence raised an issue for the jury.—*The N. Y. Rubber Co. v. Rothery et al.*, 441.
2. Mere silence of one owner to object to an erection by the other raises no presumption of a grant or license, and in the absence of a duty to speak will not constitute an estoppel.—*Id.*

ROBBERY.

1. Where the complainant at first identifies another person as the one who robbed him, but on discovering his error corrects it and explains the reason therefor, and adheres to the subsequent identification of defendant as the robber, the rela-

bility of his evidence is for the jury to determine whether it is contradicted or not.—*The People v. Foley*, 217.

2. When the property is taken by force the degree of force is not material.—*Id.*

SALE.

1. Defendants signed a contract which stated that they "had sold" to R. & Co. 1,000 tons of superphosphates at a specified rate, the goods to be sampled and analyzed by certain persons named. R. & Co. gave an order for the goods to D., which defendants accepted and took notes of R. & Co., who shortly after failed. *Held*, That the title to the goods did not pass, as they were to be analyzed before delivery and were not identified; that the subsequent acts of the parties did not make it an executed contract and that defendants were not estopped from denying a right to a delivery of goods of the same quality.—*Anderson v. Reed et al.*, 137.
2. Where one has an option to return goods, if found unsalable, and rescind the sale, this option must be exercised within a reasonable time; but where there is delay and also circumstances which go to explain the delay the question of whether the return was, in the light of the circumstances, made within a reasonable time is one of fact.—*Crandall v. Haskins*, 166.
3. A contract of sale which specifies no time for delivery is in legal effect an engagement to deliver within a reasonable time; and a complaint in an action on such contract by the seller which fails to allege a tender within a reasonable time is defective.—*Pope et al. v. The Terre Haute Car & Mfg. Co.*, 185.
4. Such defect is not waived because the objection is not taken by demurrer or answer.—*Id.*
5. Plaintiff purchased certain goods at auction which were to be delivered on payment on or before May 1. The bill of items was wrong and plaintiff offered to pay the correct amount, but was put off till May 2, when the matter was settled, payment made and the money turned over to defendant, the owner. *Held*, That defendant was bound to deliver the goods or put them where plaintiff could get them.—*Gray v. Walton*, 319.
6. In an action for refusal to deliver such goods the measure of damage is the value of the goods on the day the delivery should be made; the price they brought on the sale may be considered, but is not strong evidence of the value, nor is the recovery limited to the purchase price.—*Id.*

7. Where the vendee serves notice on the vendor that he will not receive or pay for the goods the vendor may immediately sue for breach of the contract without tendering performance or waiting for expiration of the time fixed by the contract.—*Windmuller et al. v. Pope et al.*, 490.

See CONTRACT, 11; EVIDENCE, 11; TAXES, 4, 5, 7-9.

SCHOOLS.

1. A school district cannot be compelled to pay costs awarded against the trustees in an action which they defended without instruction of a district meeting, and where they made no application to the district to audit the claim or costs such judgment binds the trustees individually and is not a charge on the district.—*The People ex rel. Wallace v. Abbott et al.*, 276.
2. Where power is conferred by statute upon a village school board to contract with, license and employ teachers, "and at their pleasure remove them," the power of removal is discretionary and no cause need be assigned therefor.—*Dunavan v. The Board of Education*, 567.

SERVICE.

1. A substantial compliance with the requirements of the Code is all that is necessary to give validity to a proceeding under § 440.—*Brooke et al. v. Saylor et al.*, 2.
2. An order of publication named the defendants to be served and gave their place of residence in Pennsylvania. It directed that if the service was by publication copies should be deposited and addressed "to at" the place aforesaid. *Held*, That there was a substantial compliance with § 440, and that the order was valid.—*Id.*

SERVICES.

1. In a proceeding to recover the value of services in nursing and caring for a testator on an agreement that plaintiff should be reasonably paid therefor evidence as to the scale of prices fixed by the nurses of the New York Hospital is irrelevant and inadmissible to support plaintiff's claim.—*De Witt v. De Witt*, 262.
2. In such a case interest on the amount found to be due cannot be allowed.—*Id.*
3. In an action to recover for services performed for a corporation it is competent for plaintiff to prove a conversation with one of defendant's directors and execu-

tive committee in which plaintiff was notified of his appointment and an agreement made that he should commence and continue in the discharge of his duties, especially when it appears that the directors knew of his services.—*Barnes v. The S., P. & O. R.R. Co.*, 410.

4. An employee who has been discharged without fault on his part but is ready at all times to perform on his part, is not bound to accept employment of a kind different from that he had undertaken.—*Fuchs v. Koerner*, 584.

See FRAUD, 15.

SHERIFFS.

See CONVERSION, 2.

SHIPS AND SEAMEN.

1. A vessel was owned by Y. and M.; by an arrangement between them Y. was to sail her as master on shares; M. to have nothing to do with manning her, hiring the seamen or paying the expenses, but to have half the balance of the receipts after paying expenses. *Held*, That the arrangement was not a demise of the vessel, and that both owners were liable for damages to one of the crew caused by a failure of the captain to procure proper treatment.—*Scarff v. Metcalf et al.*, 812.

See NEGLIGENCE, 14.

SHOPKEEPERS.

See BAILMENT.

SLANDER.

1. In an action of slander in charging plaintiff with having committed abortion upon defendant's daughter, it is competent for defendant to show, in mitigation of damages and to disprove malice, that before the speaking of the words alleged he had been informed by his daughter that plaintiff had committed abortion upon her, and he believed it to be true.—*Calkins v. Colburn*, 810.
2. In an action for slander evidence as to plaintiff's bad character must be confined to the time before the uttering of the slanderous words, and it is error to allow a witness to answer generally as to plaintiff's character. But where the plaintiff afterward testifies as a witness in his own behalf his credibility and general character becomes a proper subject of inquiry down to the time of trial, and cures the error committed.—*Id.*
3. In such an action, a witness testifying to plaintiff's good character may be asked,

upon cross-examination, whether he had heard of plaintiff's being intimate with other men's wives, as tending to show that his reputation was not good.—*Id.*

4. In an action to recover damages for false representations made by defendant concerning plaintiff where the complaint charges that such representations were made to an association and plaintiff was thereby prevented from obtaining employment defendant is entitled to a bill of particulars, stating the time and place and the persons to whom the representations were made and the persons who were thereby induced to refuse employment to plaintiff.—*Goldsmith v. Glatz*, 458.

SPECIFIC PERFORMANCE.

1. To entitle a vendee to be relieved from a contract for the purchase of land he is bound to show that the title was not such as he was bound to accept.—*Moser v. Cochrane*, 118.
2. The question as to whether a title is marketable is for the court to determine; the opinion of conveyancers is immaterial.—*Id.*
3. In an action by the vendee to recover money paid on the contract the vendor may plead proper facts and pray specific performance as a counterclaim, and on proving it is entitled to the affirmative judgment demanded.—*Id.*
4. Under Chap. 840, Laws of 1861, the city of Brooklyn acquired a fee in the lands taken thereunder impressed with a trust to hold them for park purposes, of which it could be relieved by the legislature.—*The City of Brooklyn v. Copeland*, 225.
5. After such relief a contract to sell the land and give a full covenant deed except as to liens and debts imposed by legislative action is one within the power of the city to make.—*Id.*
6. Where in an action to compel the purchaser to complete, the complaint alleges ownership in fee under the act of 1861, and the answer admitted the allegations and simply denied that the statute was competent to vest the city with the ownership in fee, *Held*, That the constitutional question affecting the validity of the act could not be questioned in this court.—*Id.*
7. A marketable title is one free from judicial doubt or uncertainty as to matters of fact, and upon which possession may be acquired and retained without litigation or judicial decision. If a reasonable doubt exists in reference to any facts upon which the title depends, or such a doubt existed that the court would not

be warranted in instructing a jury that the fact existed, or where the title depends upon a matter of fact not capable of satisfactory proof, a title is not marketable.—*Vought et al. v. Williams*, 568.

8. A contract to give a first-class title means a clean record title, or at least one not depending upon presumptions that may be overcome, or facts that are uncertain.—*Id.*
9. Where, therefore, plaintiff's title depended in part upon the death, unmarried and without issue, of a young man who had been absent from home for a period of about twenty-five years, unheard from and believed to be dead, but whose interest in the property his mother and only brother assumed to convey to plaintiff, specific performance was refused.—*Id.*

STATE.

See CANALS.

STAY.

1. In an action by an infant, the guardian not having given security for costs, an order was made requiring security or a deposit and staying all proceedings except to review the order. Plaintiff procured an order granting leave to prosecute as a poor person. *Held*, That the stay did not deprive the court of jurisdiction to grant the second order, and the latter was an answer to a motion to dismiss for failure to comply with the order requiring security.—*Shearman v. Pope*, 1.

See APPEAL, 11.

STATUTE OF FRAUDS.

See FRAUD, 6, 11, 15.

STOCKHOLDERS.

See CORPORATIONS, 1, 2, 7-11.

SUBSCRIPTION.

1. Where one signed a subscription paper to pay off a debt upon a church, which paper was on the express condition that the whole should be paid or subscribed within a year, *Held*, That in the absence of any evidence of estoppel the subscriptions made must be valid in law.—*The Presbyterian Ch. v. Cooper et al.*, 154.
2. Subscriptions by the "Ladies' Association," the "Young Men of the Church" and the "Sunday-school," none of the three bodies being incorporated, are invalid and cannot be enforced.—*Id.*
3. Part payment by the intestate of his sub-

scription in his lifetime held to be of no force, in the absence of any evidence that the part payment had any effect upon the action of the church.—*Id.*

SUPERVISORS.

1. Where a bill presented to the board of supervisors for audit and allowance is defective and insufficient in not being made out in conformity with the statutory requirements, the board may be compelled by mandamus to permit and allow the claimant to amend and correct his bill accordingly.—*The People ex rel. Mason v. Suprs. of Wayne Co.*, 81.
2. Officers are required by Chap. 841, Laws of 1864, to make a report to the supervisors of moneys received by them in which the county is interested and this report is a condition of any payment by the supervisors for services.—*The People ex rel. Calkins v. Suprs. Greene Co.*, 337.
3. The supervisors had knowledge that a police justice had received such moneys and that they were not included in his report presented. *Held*, That whether the police justice had made a proper disposition of these moneys or not, inasmuch as he had withheld them from his report, the supervisors were entitled to refuse payment of his account and that he was not entitled to a peremptory mandamus.—*Id.*

See BOUNTIES.

SURETYSHIP.

1. To secure the sureties on his bond an administrator assigned to them his interest in the estate, and afterward mortgaged said interest to another person. He failed to file an inventory, drew out the funds and could not be found. One of the sureties then commenced proceedings to be discharged and to compel the filing of the inventory. The administrator disobeyed the order of the court and was attached, but afterward accounted, and was discharged. *Held*, That the expenditure incurred by the surety in said proceedings was not created by the suretyship nor within the terms of the assignment.—*Boyle v. Boyle et al.*, 14.
2. The sureties upon a bond given by an auctioneer in the city of New York, under the provisions of § 123 of the Consolidation Act, on applying to the mayor for a license, are not liable for breach of contract with, or of duty toward persons consigning goods for sale on the part of the auctioneer; and an action can be maintained upon such bond only by those who have been defrauded by false or fraudulent representations in the sale of goods by such auctioneer.—*Viadero v. Stacom et al.*, 390.

3. The sureties on a surrogate's bond are not liable for moneys deposited by him in good faith with a banker who is in good credit and standing at the time, but who is afterward found to be insolvent.—*The People ex rel. Nash v. Faulkner*, 491.

See CRIMINAL LAW, 5; NEGOTIABLE PAPER, 14, 15.

SURROGATES.

See EXECUTORS, 5, 7; GUARDIANS, 5; SURETYSHIP, 8.

TAXES.

1. The collateral inheritance tax law applies to property within this State of a non-resident decedent.—*In re taxation estate of Enston*, 10.
2. The neglect or omission of a railroad company to make and deliver to the assessors, on or before July 1st of each year, a statement showing the real estate owned by it in the town, and its cost, as required by the provisions of the Revised Statutes, does not deprive it of the right to a hearing on grievance day and a correction of the roll, if just and proper; and if said statement is then presented, that is sufficient to entitle it to a hearing.—*The People ex rel. The West Shore RR. Co. v. Putnam et al.*, 12.
3. Under the statute for the review of assessments by *certiorari*, the writ is properly directed to the assessors, even though the roll has been duly filed in the office of the town clerk before the writ was allowed and served.—*Id.*
4. Plaintiffs sold certain real estate to one L., who agreed to pay a certain sum, less what he had to pay for taxes and assessments. L. paid certain amounts to redeem from sales for water rates, which sales were void. *Held*, That plaintiffs by receiving the balance of the purchase price ratified the payment so far as L. was concerned, and that defendants could not dispute that the money paid was theirs and was in effect paid by them.—*Remsen et al. v. Wheeler et al.*, 83.
5. Until the money paid on a redemption reaches the hands of the purchaser at a tax sale it cannot be deemed a voluntary payment to him.—*Id.*
6. Gifts, legacies and distributive shares of decedent's estates are subject to the collateral inheritance tax only when they are of the value of \$500 or upward.—*In re estate of McCready*, 188.
7. Lands were sold in 1859 for taxes and a deed given to R., who subsequently conveyed to several grantees, in quantities

which do not appear. R. died. Thereafter the sale was cancelled. R.'s administrator assigned his claim to the moneys to be refunded to relators, who applied to the comptroller for said moneys under § 85, Chap. 427, Laws of 1855. *Held*, That R.'s representatives were not entitled to these moneys, but that his grantees were so entitled.—*The People ex rel. Ostrander v. Chapin*, 515.

8. Chapter 287, Laws of 1882, in relation to tax deeds in Chautauqua and Cattaraugus Counties, is not unconstitutional.—*Ensign et al. v. Barse et al.*, 580.
9. It does not make the tax deed conclusive evidence of a complete title, but leaves the owner full right to assail the proceedings in any jurisdictional respect.—*Id.*
10. An omission of the dollar mark in the tax roll and warrant is not a jurisdictional defect; neither is a failure of the assessors to sign the roll when the certificate is signed.—*Id.*
11. There is no provision of law requiring the number of the road district or date of the commissioner's warrant to be stated in the assessment roll in the assessment of a highway tax.—*Id.*
12. Where an estate is devised and bequeathed to one for life with power to impair or diminish it during her lifetime, an assessment made under the collateral inheritance law upon the interest of those entitled to what may remain, cannot be imposed during the existence of the life estate.—*In re tax on estate of Cager*, 541.
13. Testator died in 1886, and the order imposing the tax was made in Aug., 1887. The Act of 1887, which took effect in June, excepted the estate devised or bequeathed to an adopted daughter and repealed the Act of 1885. *Held*, That the estate was not taxable.—*Id.*

TELEGRAPH.

1. Either party to a telegraph message, whether the sender or the receiver, who sustains damages from negligence in its transmission may maintain an action against the telegraph company for their recovery.—*Wolfskehl v. The W. U. Tel. Co.*, 425.

TENANTS IN COMMON.

1. Where one tenant in common of real estate enters upon such real estate and cultivates the land and raises a crop thereon the crop so raised belongs to him, and he can maintain an action for conversion against a co-tenant who enters upon the land so cultivated and carries off the crop

so raised.—*Le Barren v. Babcock et al.*, 525.

2. But the grass which grows upon such lands is governed by a different rule; like trees growing thereon it is in some respect the natural product of the lands and is a part of the realty, and the mere act of mowing such grass is not sufficient, without evidence of ouster of the co-tenants, to give the person who shall cut the same title as against his co-tenants to the grass so cut, and he cannot maintain an action against a co-tenant for entering upon the premises and drawing off the grass or hay so cut.—*Id.*

TITLE.

1. A mortgage given by B. was foreclosed, service on him being made by publication, and the executors of the mortgagee purchased on the sale. It being claimed that B. died before the foreclosure, the executors again foreclosed by advertisement against the heirs of B., satisfied the mortgage out of part of the mortgaged property and conveyed the balance to said heirs through whom plaintiff obtained title. *Held*, That plaintiff's title was good.—*Seligman v. Sonneborn*, 826.
2. An ante-nuptial agreement provided that on the death of either without issue the property of the one so dying should be the property of the other. The husband died intestate, and shortly after the wife died intestate, without issue and with no known heirs. *Held*, That the wife became the equitable owner of the husband's real estate and her interest reverted to the State, though not technically by escheat; that the legal title descended to the husband's heirs at his death and was held as a naked trust subject to the right of the widow to be vested with title on demand, and they had a right and standing to raise the objection that an act releasing the rights of the State in the land did not vest the right of the widow in the grantees from the State.—*Johnston v. Spicer et al.*, 481.

3. Chapter 377, Laws of 1885, is unconstitutional.—*Id.*

See ADVERSE POSSESSION.

TOWN BONDS.

1. Town bonds were delivered to defendant as president of a railroad, who, after the time to construct the road had expired, sold them to *bona fide* purchasers. The proceedings to organize the company were claimed to be fraudulent and the road was not built. *Held*, That an action was maintainable against defendant in favor of the town.—*Farnham v. Benedict*, 487.

2. It is essential to the organization of a railroad company that \$1,000 for each mile shall be subscribed and 10 per cent. paid in cash; payment by check is not sufficient.—*Id.*
8. The cause of action arose immediately on the bonds being negotiated and was not affected by Chap. 577. Laws of 1880, and that defendant was not relieved from liability by the fact that he had accounted to the railroad company for the proceeds of the bonds.—*Id.*

TOWNS.

1. In an action against a town to recover for injuries sustained by the fall of a wooden bridge, caused by the breaking of a decayed or rotten cord or stringer, it was shown that the bridge was in an unsafe and dangerous condition and had been so for some period of time; but it appeared that the highway commissioners employed an expert to examine, inspect and test the bridge, its cords, stringers and beams, and that he made such examination a few days before the accident, in their presence, and pronounced the bridge safe and sound. *Held*, That as it was apparent from the evidence that if a proper examination had been made and the proper tests applied the defect would have been discovered, the jury were warranted in coming to the conclusion that the expert and commissioners failed in this particular, and that the town was liable.—*Phillips v. The Town of Macedon*, 381.

See DEEDS, 1, 2; HIGHWAYS, 4, 10-13.

TRADEMARK.

1. An action to restrain the infringement of a trademark may be maintained by one who owns or controls the goods protected by such trademark; it is not necessary that he be the manufacturer of them.—*Schmid v. Maeurer*, 184.
2. Evidence sufficient to show an infringement.—*Id.*

TRESPASS.

1. Plaintiff, who was a tenant of defendant, signed an instrument, not under seal, expressing a consideration of \$1, by which defendant was allowed to make alterations in the building. In an action for trespass, it appeared that the \$1 was not paid or promised, and defendant claimed that the consideration was a new leasing of the premises, which was denied. *Held*, That a nonsuit was error; that the instrument might operate as a license, but could be explained, varied or contradicted by oral evidence, and could be revoked

before it was acted on.—*Fargis v. Walton et al.*, 471.

2. One who would justify under a license or permission must bring his acts under the terms of the license; he exceeds them at his peril. Courts of equity will interfere under peculiar circumstances where a trespass is a continuing one and a multiplicity of suits at law are involved in the legal remedy.—*Wheelock v. Noonan*, 534.

TRUSTEES.

See CORPORATIONS, 6, 11; DEPOSITIONS, 8; EXECUTORS, 4; LIMITATION, 6, 7; SCHOOLS, 1.

TRUSTS.

1. A parol agreement of the grantee upon a conveyance of land that he will hold the same for the benefit of the grantor and reconvey upon request is void under 3 R. S., 185, § 6, and in the absence of fraud the grantor is without relief.—*Hubbard v. Sharp et al.*, 455.

See MORTGAGE, 15, 16; WILLS, 8, 19.

UNDERTAKING.

See ARREST, 1.

USURY.

1. A promissory note by its terms payable with lawful interest, made by A. for the accommodation of B. and by the latter indorsed and transferred to C. for less than its face is void and the defense of usury complete to an action brought upon it by C. unless defeated by estoppel. And when inquiry is made by C. of A. before or at the time of purchase of such a note then made, and A. characterizes the note as given for value, good and all right, A. is estopped as against C. to effectually assert usury as a defense.—*Brown v. Martin*, 485.
2. There is no apparent reason why the same rule should not apply to representations in respect to a note to be made. It is sufficient for *estoppel en pais* that the representations made by defendant were calculated to mislead plaintiff and did have that effect.—*Id.*

VAGRANTS.

1. A charge that a child was found improperly exposed and neglected and wandering in a park without proper guardianship, and was found in company of a reputed prostitute, is not sufficient under § 291, Penal Code. An allegation that she was exposed by those who had charge of her is necessary.—*The People ex rel. Van Riper v. The N. Y. Catholic Protectory*, 260.

2. Where the commitment recites that the conviction proceeded on satisfactory evidence of the charge, and such recital is not contradicted, the admission by demurrer of other facts in the traverse tending to show a wrongful conviction furnishes no ground for a discharge.—*Id.*
3. Where, however, no notice was given to the father of the child and he was not present at the examination no jurisdiction is acquired by the justice, although the mother was present and is the relator.—*Id.*
4. On granting or affirming an order of discharge the General Term has no authority to give costs.—*Id.*

VENUE.

1. The complaint alleged that defendant was nominated and confirmed as quarantine commissioner and entered on his duties; that it was requisite that he should be a resident of the metropolitan district, when appointed or during his incumbency or both, and that he never was such resident; also that his oath was improperly taken and filed. It demanded judgment that defendant be declared to have usurped the office, that the latter be declared forfeited, that defendant be ousted and that he pay a fine of \$2,000. *Held*, That the action was in the nature of a *quo warranto* and that the attorney-general might lay the venue in any county. That it was not an action to recover a fine or penalty.—*The People v. Platt*, 497.

VILLAGES.

1. Actions to recover damages for injuries caused by negligence of the servants of municipal corporations are not within the purview of § 3245.—*Gage v. The Village of Hornellsville*, 8.
2. A claim against a village cannot under said section be presented to the board of trustees; the chief fiscal officer is the treasurer.—*Id.*
3. In pursuance of a power given by the charter "to restrain and prohibit all runners, solicitors or guides for boats, carriages, railroads, public houses, etc.," the village trustees passed a by-law or ordinance, providing "that all persons are prohibited within the corporate limits of this village from running for or soliciting any passengers or persons for any public or private conveyance, or for any tavern, boarding house, etc.," under a penalty. *Held*, That the by-law was applicable to such solicitations made upon one's own land to persons passing along the street, as well as to solicitations made within the limits of

the street itself, and such a by-law was reasonable and valid in law.—*The Village of Niagara Falls v. Salt*, 48.

4. Where a change in the grade or slope of a sidewalk in a village street has been made by the owner of the adjoining premises in rebuilding, and it does not appear that the village trustees, by formal corporate action, have ever adopted or approved of such grade as changed, the village cannot claim exemption from liability upon the ground that plaintiff's injuries were occasioned by a defect in the mere plan of the work. The mere acquiescence of the trustees, or their omission, after knowledge thereof, to take any action in reference to the matter, is not sufficient to show an adoption or approval of the plan of the sidewalk as reconstructed.—*Granger v. The Village of Seneca Falls*, 64.
5. The treasurer of a village organized under the General Act of 1870 is required to keep the fund raised for highway purposes separate and distinct from that raised for other purposes, to be devoted solely to the making and improving of the roads, streets, etc., of the village; and when the trustees of the village attempt to draw this fund for the purpose of paying for lands for highway purposes he may properly question the legality of this action and disregard their order in the premises.—*The People ex rel. Rundell v. Weston*, 307.

WAIVER.

See EVIDENCE, 5, 18; FIRE INSURANCE, 4, 8; JUDGMENT, 8; REFERENCE, 7.

WASTE.

1. Testator by his will gave the residue of his estate to his heirs equally. By a subsequent clause in the will he gave his whole estate to his executors in trust to pay his debts and specific legacies with power of sale. Among the specific devises was one of a life estate in certain real estate. *Held*, That testator's heirs might sue for waste committed by the life tenant in cutting growing trees.—*Bouton et al. v. Thomas et al.*, 234.

WATERCOURSE.

See ADJOINING OWNERS; EVIDENCE, 2-5; RIPARIAN OWNERS.

WHARFAGE.

1. The wharf property of citizens may be taken, but it must be paid for fairly and in the ordinary manner.—*Williams v. The Mayor, etc. of N. Y. et al.*, 28.
2. Certain water lots to be made land and

gained out of the Hudson were conveyed by the city to plaintiff's grantors with the right of wharfage, etc., the grantees to build wharves and all streets through the premises. These conditions were complied with. *Held*, That the grantees were owners of an easement for the approach of vessels in front of their wharves both as against the city and the State, and that plaintiff was entitled to be compensated for the destruction thereof by the appropriation by the city of a portion of the exterior line for a street.—*Id.*

3. A reservation in the deed of "such streets as may be laid out through the premises" does not include a street laid out by the department of docks, as said department has no power to lay out streets.—*Id.*
4. A bill of lading provided that the steamer had the option of discharging at New York or Brooklyn, consignees to pay charges as expressed in the margin. It refused to deliver to defendants in New York, but discharged on plaintiff's wharf in Brooklyn. *Held*, That under the contract it had a right to do so, and that plaintiffs could recover the rates specified in the margin of the bill of lading.—*Woodruff et al. v. Havemeyer et al.*, 42.
5. Chap. 320, Laws of 1872, does not prohibit the owner of a private wharf from entering into a contract for the landing and deposit of goods on his wharf on such terms as may be agreed on with the owner of the goods.—*Id.*

WILLS.

1. Unless a testator knows the contents of the alleged will at the time of its attempted execution no valid execution can be made; subsequent knowledge is not sufficient to validate it.—*In re probate will of Hatten*, 112.
2. Evidence insufficient to show such knowledge.—*Id.*
3. An action for the construction of a will cannot be maintained by a legatee or devisee to determine what he may be entitled to under it.—*Hovey v. Purdy et al.*, 117.
4. Where a will has been prepared or procured by one interested in its provisions, an additional burden is imposed upon those who seek to establish it; the circumstance is regarded by the court with suspicion and jealousy, and there must be stronger proof than would else be required that the paper propounded expresses the free, unbiased testamentary purpose of the alleged testator, and not merely the wishes of the interested beneficiary. Moreover, the existence of a confidential relation, such, for example,

as subsists between physician and patient, implies itself peculiar opportunities for the exercise by the former over the latter of influence and authority, so that if he has been instrumental in procuring from his patient a will containing provisions greatly to his advantage fraud and undue influence will readily be inferred unless all jealous suspicion is put to rest by satisfactory testimony.—*In re estate of Peck*, 157.

5. Section 1861 of the Code does not deprive the Surrogate's Court of any jurisdiction which it otherwise had, but simply confers jurisdiction upon courts to entertain an action to procure a judgment establishing a will under certain circumstances.—*In re will of Delaplaine*, 204.
6. The power given by Code, § 3586, to the appellate court to admit further testimony or documentary evidence and to appoint a referee should be cautiously exercised. It seems that if one side be permitted to introduce further testimony the other side should have the same privilege.—*In re will of Hannah*, 211.
7. Testator gave certain annuities and directed that on the death of the annuitants the principal should be divided between his grandchildren. He also gave the residue to his executors to dispose of and invest the proceeds and use the income for certain grandchildren named and on the death of each to pay the principal to the issue of the one so dying. By a codicil he revoked the provision made for respondent and her issue "in the residuary clause." *Held*, That this did not apply to the division of the annuity fund.—*In re settlement of Willets et al.*, 223.
8. Where there are several distinct trusts it is proper for the trustee to keep a separate account with each trust.—*Id.*
9. The fact that the provision made by will for testator's daughter is much less than she would have received in case of intestacy is not of itself evidence that testator lacked testamentary capacity.—*In re probate will of Tracy*, 280.
10. To invalidate a will on account of his habits of intoxication and their effect on his faculties, it must appear that at the time of its execution testator was so enfeebled in mind by the use of intoxicants, or was then so intoxicated, as to be incapable of making a will.—*Id.*
11. A mistake as to facts will not constitute a delusion which will invalidate a will; to have that effect it must be an insane delusion as defined in the law.—*Id.*
12. While a subsequent will does not revoke a former will unless it so declares, or is

- inconsistent with it, there is a different rule of construction to it and a codicil.—*Newcomb et al. v. Webster et al.*, 829.
18. The latter is supplemental to and is a republication of the will, and the rule of construction requires, if it can fairly be done, that it be construed in connection with the will, and in harmony with its provisions; and the fact that it contains a residuary clause which covers all the estate not specifically disposed of cannot have the effect to supersede the specific bequests and devises of the will not inconsistent with the codicil.—*Id.*
 14. When the will gives to a devisee a life estate in real property with a limited power of disposition, *e. g.*, among the devisee's relations, upon the death of such devisee without any exercise of this power the heirs of the testator hold the fee free of the power.—*Webb et al. v. Sanford*, 384.
 15. On construction of the provisions of the will in question, *Held*, That it did not vest a fee in testator's wife (the devisee), but only a life estate with a limited power of disposition.—*Id.*
 16. The will of testator gave to plaintiff's testatrix a legacy "to be paid * * * out of moneys derived from the sale" of a specified farm "or otherwise if it shall seem best to them," the executors *Held*, That the discretion was as to payment from other assets, and if such discretion was not exercised the legacy should be paid from the avails of the farm.—*Van Rensselaer v. Van Rensselaer et al.*, 877.
 17. Where a will provided that the executors might from time to time make actual partition of any property which testator held in common with others, and also that in their discretion they might, for the purpose of partition or the purposes of the will, sell any of the property at public or private sale, *Held*, That a sale could be made for the purpose of a partition during the life of the life tenant, his widow, especially where she had joined in the contract to sell.—*Knapp et al. v. Knapp et al.*, 888.
 18. Testatrix by her will devised all the residue of her property and estate to her four daughters. By a codicil she gave all her real estate situated on a certain street to a son and daughter, describing it as her homestead, subject to all incumbrances. She had before this given a mortgage on a portion of this property describing it as her homestead. *Held*, That this fact did not cut down the extent of the devise as stated in the codicil, and that the codicil revoked the former devise to the daughters.—*Folk v. Stocking et al.*, 404.
 19. By the will of testator a sum of money was bequeathed to defendant in trust for the life of his daughter, and on her death testator gave one half to plaintiff subject to the proviso in the next subdivision which was that in case of her death in the lifetime of her father and without issue the fund should go to other relatives of testator. *Held*, That plaintiff took a defeasible title; that on the death of the life tenant the trust ceased and plaintiff was entitled to possession of the fund.—*Graham v. The N. Y. Life Ins. & Trust Co.*, 419.
 20. Where a will is not unreasonable in its provisions, though some of the evidence excluded was admissible, a decree admitting the will to probate will not be set aside for such error unless the court can see that the contestant was prejudiced by the rulings.—*In re probate will of Blaker*, 486.
 21. An inquisition taken upon a commission of lunacy is not admissible in evidence as against the proponent of a will unless it embraces the time in which the will was made within that in which the testator was found to be of unsound mind.—*Id.*
 22. A will of the use or income of real and personal estate of the testator to his widow during life, and after her death the use of it to her seven children during their lives, share and share alike, and after the death of each child the share of such deceased to be equally divided between the grandchildren of the testator then living, is valid, and does not operate as an unlawful suspension of alienation, or of the absolute ownership of the property real or personal.—*Id.*
 23. When there is no specific lien for the payment of debts created by the terms of a will the statutory lien upon decedent's real estate continues only for three years from the time of granting letters, and a *bona fide* purchaser may after that time take title relieved from the charge for the payment of debts. An assignee for the benefit of creditors is not such purchaser.—*In re application of the City of Rochester*, 522.
 24. Where at the time of making the will and the death of testator the amount of his personal property was inadequate to pay his debts, it must be assumed that he appreciated the situation, and had in view the purpose to give and devise only what remained after payment of his debts, and intended to make by his will his debts a charge on his real estate.—*Id.*
 25. Where in proceedings to revoke the probate of a will, the names of the exec-

utors appear in the citation, but not in their representative character, and they appear solely as legatees and move to dismiss the proceedings upon the ground that they had not been served as executors, the citation may be amended by stating their representative character.—*In re probate will of Soule*, 557.

26. A recital in a decree admitting a will to probate that a certain person appeared by counsel and consented thereto does

not preclude such person in proceedings to revoke the probate from contradicting the recital and showing its falsity.—*Id.*

27. An order simply denying a preliminary motion to dismiss proceedings taken to revoke the probate of a will does not affect a substantial right, and is not appealable.—*Id.*

See ATTORNEYS, 2; EVIDENCE, 14, 19; EXECUTORS, 3, 4; GUARDIANS, 2; LEGACIES.

See, e. a. a.

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